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Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner

v.

SIMONA M. LOPES, CATHERINE E. WHITE, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RANDOLPH S. SHERMAN
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

KERRY ALAN SCANLON
WILLIAM HOFFMAN
Kaye Scholer LLP
901 15th Street NW
Washington, DC 20005
(202) 682-3500

EVAN R. CHESLER
Counsel of Record
DARIN P. MCATEE
REBECCA R. SILBER
LINDSAY J. SMITH
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
echesler@cravath.com

Counsel for Petitioner

October 4, 2010

QUESTIONS PRESENTED

The Fair Labor Standards Act ("FLSA") includes various "white-collar" exemptions intended by Congress to distinguish employees who are covered by the statute from those who are not. For seven decades, the pharmaceutical industry has classified its sales representatives as exempt from the FLSA's overtime pay requirement, in reliance on the administrative and outside sales exemptions. The Third Circuit has held that the administrative exemption applies to these employees. The Second Circuit held that neither exemption applies, according "controlling" deference to an amicus brief of the Department of Labor ("DOL"), which advocated that position for the first time. The questions presented are:

1. Whether the Second Circuit's holding that highly-paid pharmaceutical sales representatives are not covered by the FLSA's administrative exemption, in direct conflict with the Third Circuit, or the outside sales exemption, is contrary to the statute's text, purpose and DOL's long-standing regulations.

2. Whether an agency's break with prior interpretations of its regulations, advanced for the first time in an amicus brief, is entitled to heightened deference under *Auer v. Robbins* when it is inconsistent with the statute and its regulations, and causes unfair surprise by upsetting 70 years of settled expectations.

PARTIES TO THE PROCEEDING

Petitioner here and defendant-appellee below is Novartis Pharmaceuticals Corporation ("NPC").

Respondents here and plaintiffs-appellants below are a class of current and former pharmaceutical sales representatives employed by Petitioner in New York, California, and other states, certified by Order entered February 15, 2007 in *In re Novartis Wage and Hour Litigation*, Dkt. No. 18, 06-MD-1794 (PAC) (S.D.N.Y.), an action which consolidated two cases: *Lopes v. Novartis Corporation, et al.*, No. 06-Civ-2268 (S.D.N.Y.), brought by Respondent Simona M. Lopes and Carol Bollinger,[1] and *White v. Novartis Pharmaceuticals Corporation*, No. 06-Civ-02764 (C.D. Cal.), brought by Respondents Catherine E. White and Minel A. Hider Tobertga.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

NPC certifies that Novartis Finance Corporation, Novartis Corporation, Novartis Holding AG and Novartis AG are NPC's parent corporations. Novartis AG is the only publicly held corporation that holds ten percent or more of NPC's stock.

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[1] Carol Bollinger has dismissed all claims against NPC and is not a Respondent to this petition. Joint Stipulation of Partial Dismissal, *Lopes*, Dkt. No. 97 (Apr. 14, 2008).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Novartis Pharmaceuticals Corporation ("NPC") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals (App. 1a-36a) is reported at 611 F.3d 141 (2d Cir. 2010). The district court's opinion (App. 39a-82a) is reported at 593 F. Supp. 2d 637 (S.D.N.Y. 2009).

JURISDICTION

The judgment of the Second Circuit (App. 37a-38a) was entered on July 6, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, the relevant regulations of the Department of Labor ("DOL") promulgated thereunder, 29 C.F.R. §§ 541.200-541.204, 541.500-541.504, and the relevant portion of the Preamble to the final DOL regulations promulgated in 2004 are set forth in the appendix to this petition (App. 85a-150a).

STATEMENT

This petition concerns the Fair Labor Standards Act ("FLSA") and two of its "white-collar" exemptions—for administrative and outside sales employees—which are critical to American businesses. The Second Circuit's decision has abruptly undone the regime put in place by Congress and enforced by DOL for seven decades, created a split between the circuits and fundamentally altered the legal standards businesses use to determine whether millions of workers are entitled to overtime pay. The court's reinterpretation of these exemptions—reached by deferring to an unsolicited DOL amicus brief—will change the balance between exempt and non-exempt workers under a statute that touches all corners of the U.S. economy. The decision imposes significant and unanticipated costs on American industry by subjecting businesses that utilize administrative and sales employees to substantial retroactive overtime liability. In addition to the broad national interests implicated by these circumstances, there are three specific issues that warrant review.

First, the decision below construes the FLSA's administrative exemption in direct conflict with the Third Circuit, which has held that pharmaceutical sales representatives ("sales reps" or "reps") are covered by the administrative exemption. The Second Circuit's decision also applies a rationale that has been squarely repudiated by both the governing regulations and the D.C. Circuit, in a case applying the same exemption in a different industry.

Second, the decision below recasts the outside sales exemption by imposing a highly technical standard that is contrary to the text and purpose of the statute and its regulations, and is at odds with interpretations by other circuits.

Third, these far-reaching interpretations of the exemptions resulted from the Second Circuit according "controlling deference" under *Auer v. Robbins*, 519 U.S. 452 (1997), to an amicus brief submitted, *sua sponte*, by DOL. The court granted this deference despite the fact that DOL's amicus views represented a sharp break from the agency's long-standing interpretations of these exemptions, as expressed in formal rulemaking. This "regulation by amicus brief" creates unfair surprise by upsetting long-standing expectations and will impose massive retroactive liability and cause fundamental changes in the pharmaceutical industry. The Court should address whether controlling deference under *Auer* is appropriate when an agency's informal interpretation alters the regulatory landscape in a significant and unanticipated fashion.

A. The FLSA and Its White-Collar Exemptions

The FLSA was enacted in 1938 as part of the New Deal to protect American workers from "substandard labor conditions". *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946). Congress sought to "promote economic justice and security for the lowest paid of our wage earners . . . to protect this Nation from . . . wages too low to buy the bare necessities of life and from long hours of work injurious to health". S. Rep. No. 640, 81st Cong., 1st

Sess. (1949). The Act imposes minimum wage and maximum hour protections, including the requirement that employees be paid time-and-a-half when they work more than 40 hours a week. *See* 29 U.S.C. § 207(a)(1).

But "[t]he goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection". *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997). The FLSA exempts from its overtime requirement "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of an outside salesman". 29 U.S.C. § 213(a)(1). These white-collar exemptions were central to the statute. As DOL explained in 2004 following notice-and-comment rulemaking:

> The legislative history [of the FLSA] indicates that the [white-collar] exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week[.]

Dep't of Labor, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22123-24 (Apr. 23, 2004) ("Final Rule").

1. DOL's 1940 Regulations

Early efforts to amend the FLSA to exclude all white-collar employees ceased with the general understanding that the "duties" test for these workers—one of the issues here—would be relaxed in the implementing regulations. Marc Linder, *Time and a Half's the American Way: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004*, 513-21, 678 (2004). Thus, the regulations adopted in 1940 defined an "administrative" employee expansively, covering any employee who "is compensated . . . at a rate of not less than $200 per month" and "whose work involves the execution under only general supervision of special non-manual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment". 29 C.F.R. § 541.2 (1940). A 1940 DOL report that issued along with the new regulations made clear that the exemption should cover broad categories of office workers and require the exercise of only minimal discretion. Dep't of Labor, Wage & Hour & Pub. Contracts Div., Report and Recommendations of the Presiding Officer (Harold Stein) on Proposed Revisions of Regulations, Part 541 ("Stein Report"), at 26-27 (Oct. 10, 1940). For example, the report explained that an executive secretary's ability "to distinguish between callers at the office" constituted the kind of "exercise of

discretion and independent judgment" that qualifies for the administrative exemption. *Id.* at 27.

Critically, DOL provided that where it was "difficult" to determine whether the "discretion and independent judgment" requirement has been met, "inclusion or exclusion should be determinable by reference to a completely objective requirement" which was to be "the payment of a stated salary". *Id.* at 26. This "salary criterion" was viewed as the "best and most easily applied test" for the exemption. *Id.*[2]

Further, the 1940 regulations defined an "outside salesman" as one "who is customarily and regularly engaged away from his employer's place or places of business in making sales within the meaning of section 3(k) of the Act". 29 C.F.R. § 541.5 (1940). The FLSA's broad definition of "sale", expressly incorporated by DOL in its regulations interpreting the outside sales exemption, "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition". 29 U.S.C. § 203(k). The 1940 Stein Report explained that what was required was that the employee "in some sense make a sale". Stein Report at 46.

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[2] The $200/month salary set forth in the 1940 regulations, and described in this report as the line above which employees should qualify for the administrative exemption, is an amount equivalent to a current annual salary of approximately $37,000. *Dollar Times*, www.dollartimes.com/calculators/inflation.htm (last visited Sept. 23, 2010). NPC's sales reps earn an average annual salary of $91,500, two-to-three times that amount. *See infra* p. 10.

2. DOL's 2004 Final Rule

With the exception of periodic changes to the pay threshold, the relevant regulations remained largely unchanged for many years. Beginning in the mid-1980s, DOL undertook a review of the white-collar exemptions, which culminated in a 2004 notice-and-comment rulemaking. These revised regulations were "the subject of extensive public commentary for two decades", congressional oversight hearings and a 1999 General Accounting Office report, which recommended that DOL streamline and clarify the white-collar exemptions to better accommodate the modern workplace. Final Rule at 22124-25. Addressing a concern that the administrative exemption was "confusing and applied inconsistently" by DOL, *id.*, the agency simplified the test to focus on a non-exclusive list of factors to determine whether employees exercise "discretion and independent judgment", *id.* at 22143-44. This minimal test eliminated an earlier requirement that the exempt employee "customarily and regularly" exercise discretion. *Id.* In rejecting this requirement, DOL made clear that it was adopting "the definition of discretion and independent judgment to reflect existing federal case law," which required only that the employee's "primary duty . . . '*include*' the exercise of discretion and independent judgment". *Id.* at 22142-43 (emphasis added).[3] DOL stated its intent "to

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[3] DOL cited, as relevant case law, *O'Dell v. Alyeska Pipeline Service Co.*, which held that an inspector who exercised "*some* discretion and independent judgment during the course of his job . . . was [exempt]", 856 F.2d 1452, 1454 (9th Cir. 1988) (emphasis added), and *Dymond v. U.S. Postal Service*, which

eliminate outdated and confusing language from existing guidelines" and noted that "[f]ederal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case analysis is required". *Id.* at 22142-43.

The Final Rule also confirmed the breadth and flexibility of the outside sales exemption. The changes made to the regulations were minor, including a new "primary duty" test to determine whether an employee's duties were primarily outside sales. *See, e.g., id.* at 22160, 22161. The Preamble reaffirmed DOL's long-standing position that the outside sales exemption requires only that an employee "*in some sense*, has made sales". *Id.* at 22162 (citing Stein Report).

B. The Critical Role of Sales Reps in the Sale of Prescription Medications

Pharmaceutical companies must sell their products in accordance with the federal Food, Drug and Cosmetic Act ("FDCA"), 21 U.S.C. §§ 301 *et seq.*, and its accompanying regulations, 21 C.F.R. Pts. 200-299, which prohibit these companies from transferring title to their prescription medicines directly to doctors or patients. *See* 21 U.S.C. § 353(b)(1). Instead, pharmaceutical companies utilize their sales reps to generate sales of medicines by persuading physicians to make the determination,

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held that the administrative exemption is met when the "employee's primary duty simply *includes* work requiring the exercise of discretion and independent judgment", 670 F.2d 93, 95 (8th Cir. 1982) (internal quotation marks and citations omitted) (emphasis added). *See* Final Rule at 22143.

in conjunction with their patients, to write prescriptions for the company's products. Sales reps visit physicians, educate them about particular medications, address concerns they have and ultimately close the sale by obtaining the physicians' commitment to prescribe those medications for appropriate patients. App. 42a; *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 671-72, 677-79 (W.D. Pa. 2009), *aff'd*, 2010 WL 1063935 (3d Cir. 2010).[4] Sales reps are often the only point of contact between doctors and pharmaceutical companies.

To gain physicians' commitments to prescribe, sales reps must develop a rapport with them, understand their questions and demonstrate how certain medications can serve the physicians' patients. To ensure compliance with Food and Drug Administration ("FDA") regulations, sales reps use detailed materials provided by the company for their presentations, but it is still up to the sales reps to "tailor their presentations to each individual physician based on such variables as the amount of time the physician allocates to meeting with the [sales rep]; the physician's patient base and prescribing habits and the [sales rep's] assessment of the physician's personality". App. 43a. "[Sales reps] are capable of mounting an impressively sophisticated and intense marketing pitch." *IMS Health, Inc.*, 550 F.3d at 46. Sales reps also have discretion to allocate a budget for appropriate meals

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[4] The function of sales reps is generally the same across the pharmaceutical industry. *See, e.g., IMS Health, Inc. v. Ayotte*, 550 F.3d 42, 46-47 (1st Cir. 2008); *Baum*, 605 F. Supp. 2d at 687; *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 694 n.14 (S.D. Ind. 2009).

and educational seminars for physicians and their staffs, and to distribute free samples of medications in a strategic way to physicians. App. 43a.

That sales reps "succeed[] in inducing physicians to prescribe large quantities of brand-name drugs seems clear (even if the exact magnitude of that effect is not)". *IMS Health, Inc.*, 550 F.3d at 56. "Not only do visits from sales rep[s] increase drug sales, but they do so more than advertisements directed to physicians in professional journals or advertisements directed to consumers". David Orentlicher, *Prescription Data Mining and the Protection of Patients' Interests*, 38 *J.L. Med. & Ethics* 74, 76 (Spring 2010).

Sales reps work outside of NPC's offices. App. 44a, 67a-68a. They develop their own business plans and set their own schedules. App. 43a. Sales reps determine how often to visit particular physicians, but are expected to make a total number of sales calls each day. App. 44a. Their supervisors usually communicate with them electronically. App. 44a, 67a-68a. To fill sales rep positions, NPC seeks individuals who are college-educated, self-motivated and have the ability to work independently. App. 41a. When hired, sales reps are told that they are part of NPC's sales force and that they will be engaged in selling NPC products. *Id.* NPC provides sales reps with extensive training in sales techniques and other subjects relevant to NPC products. *Id.*

Sales reps are well-paid and their compensation is tied to sales of their products in their assigned territory. App. 44a. At NPC, sales reps average $91,500 in salary and commission and are eligible for

other performance-based rewards such as all-expenses-paid vacations. *Id.* The industry-wide median is more than $93,000.[5] Commissions represent 15-25 percent of a sales rep's salary at NPC. App. 41a, 44a. The position is considered one of the most desirable American jobs.[6]

Sales reps compose a significant part of the pharmaceutical industry's workforce. At NPC there are 6,000 sales reps out of 13,000 total employees. App. 41a. Overall, the American pharmaceutical industry employs approximately 100,000 reps.[7] NPC annually spends over $500 million on sales reps. App. 67a. Pharmaceutical companies spend billions of dollars on marketing directed at physicians—sales reps representing the vast majority of those expenditures. *IMS Health, Inc.*, 550 F.3d at 70 n.17 (Lipez, J., concurring and dissenting).

Comparing themselves to assembly line workers, Respondents claim that regulatory limitations make them nothing more than robots. App. 78a. But, as one court explained, "[n]o one can honestly say that a

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[5] Jennifer Merritt, Carolyn Bigda & Donna Rosato, *Young and Restless—top 20 jobs*, *Money Magazine* (2007), *available at* http://money.cnn.com/galleries/2007/moneymag/0703/gallery.bestjobs_young.moneymag/16.html.

[6] *See supra* note 5; *see also* Linda Wang, *Chemical & Engineering News, Employment Outlook—Prescription for Success in Sales*, Feb. 19, 2007, at 43-46, *available at* http://pubs.acs.org/cen/employment/85/8508employment.html ("With the good pay, flexible hours, and the strong business foundation it provides, it is no wonder that pharmaceutical sales is a popular job.").

[7] *See supra* note 6.

salesperson is effective simply by spitting out a memorized script; no one can imagine a company that would require rote adherence to planned words in any situation". *Baum*, 605 F. Supp. 2d at 685. Or, as the district court here noted, such assertions "do not begin to answer why or how a robot or an automaton could or should earn an average salary of $91,500 per year". App. 78a.

C. Historic Treatment of Sales Reps Under the FLSA

For decades it has been the universal "practice throughout the pharmaceuticals industry" to classify sales reps as exempt employees under the FLSA and thus not subject to overtime requirements. App. 10a. There is ample historic justification for this practice.

In 1945, DOL issued an opinion letter stating that a pharmaceutical company's "medical detailists" (as sales reps are also referred to), whose work was "aimed at increasing the use of [the company's] product in hospitals and through physicians' recommendations", and who maintained relations with doctors, were exempt administrative employees. Applicability of exemption for administrative employees to medical detailists, May 19, 1945, 2 Lab. L. Rep. (CCH) ¶ 33,093 (3d ed. 1946). In making its determination, DOL noted that the detailists worked "virtually without supervision", were paid more than the statutory minimum, did work "directly related to general business operations", used "their discretion and independent judgment" and had "skills or knowledge acquired through special training or experience". *Id.*

During the ensuing decades, DOL never repudiated its 1945 opinion or suggested that sales reps' job responsibilities had changed in a way that warranted reclassification. The first challenge to the sales reps' exemption came in 1982, in a private lawsuit. A federal district court held that, notwithstanding restrictions placed on the sales rep by her employer, the plaintiff's exercise of discretion and independent judgment qualified her for the administrative exemption. *See Cote v. Burroughs Wellcome Co.*, 558 F. Supp. 883, 886-87 (E.D. Pa. 1982). The court relied in part on DOL's 1945 opinion. *Id.* at 886 n.2. Until the present case, DOL had not expressed disagreement with *Cote* or with the industry's treatment of sales reps as exempt.

Recently, a handful of pharmaceutical sales reps have brought several suits challenging their exempt status. Just this year, the Third Circuit upheld the applicability of the administrative exemption, concluding that a sales rep's exercise of at least some independent judgment and discretion with respect to matters of significance satisfies the minimal test adopted by DOL in the 2004 rulemaking. *Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010). And a clear majority of the federal district courts to consider the issue have held that sales reps are covered by the administrative exemption as a matter of law or that the question was a triable issue of fact.[8] Similarly, the majority of federal courts

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[8] *See Jackson v. Alpharma Inc.*, No. 07-3250, 2010 WL 2869530 (D.N.J. July 19, 2010); *Baum*, 605 F. Supp. 2d at 686-87, *aff'd*, 2010 WL 1063935; *Schaefer-LaRose*, 663 F. Supp. 2d at 694; *Ruggeri v. Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 254, 277 (D. Conn. 2008); *Amendola v. Bristol-Myers*

have held that sales reps qualify for the outside sales exemption.[9]

D. Proceedings Below

Respondents are a class of current and former NPC sales reps, who brought two lawsuits in 2006 claiming that the FLSA and state law mandate the payment of overtime wages. The suits were consolidated in the Southern District of New York.

Squibb Co., 558 F. Supp. 2d 459, 477 (S.D.N.Y. 2008); *Cote*, 558 F. Supp. at 887. *But see Harris v. Auxilium Pharms.*, No. 07-cv-03938, slip op. at 5 (S.D. Tex. Sept. 28, 2010); *Jirak v. Abbott Labs., Inc.*, No. 07 C 3626, 2010 WL 2331098, at *4 (N.D. Ill. June 10, 2010).

[9] *See Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498, 2009 WL 4051075, at *5 (D. Ariz. Nov. 20, 2009) (consolidated appeal pending in the Ninth Circuit); *Schaefer-LaRose*, 663 F. Supp. 2d at 688; *Baum*, 605 F. Supp. 2d at 686, *aff'd on other grounds*, 2010 WL 1063935; *Delgado v. Ortho-McNeil, Inc.*, No. SACV 07-00263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009) (consolidated appeal pending in the Ninth Circuit); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. SACV 07-00127, 2009 WL 3326632, at *6 (C.D. Cal. Feb. 6, 2009) (same); *Rivera v. Schering Corp.*, No. CV 08-1743, 2008 WL 6953955, at *3 (C.D. Cal. Aug. 14, 2008) (California law); *Brody v. AstraZeneca Pharms.*, No. CV 06-6862, 2008 WL 6953957, at *9 (C.D. Cal. June 11, 2008) (same); *Menes v. Roche Labs., Inc.*, No. 07 CV 01444, 2008 WL 6600518, at *2 (C.D. Cal. Jan. 7, 2008) (same); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257, 1265 (C.D. Cal. 2007) (same); *D'Este v. Bayer Corp.*, No. CV 07-3206, 2007 WL 6913682, at *4 (C.D. Cal. Oct. 9, 2007) (same). *But see Harris*, No. 07-cv-03938, slip op. at 5; *Jirak*, 2010 WL 2331098, at *4; *Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385, 402-03 (D. Conn. 2009), *aff'd*, No. 09-1945-cv, 2010 WL 2669304 (2d Cir. July 6, 2010); *Smith v. Johnson & Johnson*, No. 06-4787, 2008 WL 5427802, at *7 (D.N.J. Dec. 30, 2008), *aff'd on other grounds*, 593 F.3d 280 (2010); *Ruggeri*, 585 F. Supp. 2d at 272; *Amendola*, 558 F. Supp. 2d at 472.

App. 39a. The jurisdiction of the district court was properly invoked pursuant to 28 U.S.C. §§ 1331 and 1367. Respondents seek back pay for overtime allegedly worked by the sales reps. After discovery, NPC moved for summary judgment, claiming that the sales reps were covered by both the outside sales and administrative exemptions. Respondents cross-moved for summary judgment.

Granting summary judgment for NPC, the district court held that both exemptions applied. App. 40a. Finding *Cote* "directly applicable", the court held that sales reps "engaged in many of the same discretionary activities", and thus "meet each of the administrative exemption's requirements". App. 78a-79a. The court rejected the characterization of sales reps as "mere 'robots'", explaining that "employees may exercise discretion and independent judgment even when they carry out their duties within the confines of a highly regulated industry". App. 79a. The district court also held that the outside sales exemption applied because sales reps "make sales in the sense that sales are made in the pharmaceutical industry . . . by obtaining commitments to prescribe NPC drugs from physicians. They are credited with those sales and compensated accordingly by means of incentive payments." App. 62a, 68a-69a.

The Second Circuit reversed. Giving "controlling deference" to an amicus brief filed by DOL, App. 17a, the court rejected the application of both exemptions as a matter of law. With regard to the administrative exemption, the court acknowledged that the reps exercised discretion and independent judgment in performing their job duties,

but deferred to DOL's newly articulated position that the reps are not "*sufficiently* allowed to exercise either discretion or independent judgment in the performance of their primary duties" and that "for the administrative exemption to apply to the [sales reps], the regulations require a showing of a *greater* degree of discretion, and *more* authority to use independent judgment in matters of significance, than NPC allows the Reps". App. 33a, 35a (emphases added). With regard to the outside sales exemption, the Second Circuit again deferred to DOL's reassessment of the exemption, and held that because the sales reps "cannot transfer ownership" of drugs and do not obtain a legally binding commitment from physicians, they do not make "sales", even within the broad meaning of the FLSA. App. 27a-29a. Following its decision, the Second Circuit granted NPC's motion to stay the mandate.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because the Second Circuit's New Standards Will Become the National Default Rule, Undermining the Congressionally Created Balance Between Exempt and Non-Exempt Employees and Disrupting a Major American Industry

The Second Circuit's erroneous decision warrants, and is ripe for, the Court's review because it will have immediate disruptive effects on American employers and will become the national standard if uncorrected by the Court.

1. Although Congress passed the FLSA to protect American workers from oppressive working

conditions, *see Nicholson*, 105 F.3d at 1363, "its application is not unlimited". *Cleveland v. City of Elmendorf*, 388 F.3d 522, 526 (5th Cir. 2004). Congress designed the white-collar exemptions to exempt from the FLSA well-paid employees working in positions that were difficult to standardize based on hours worked. *See* Final Rule at 22123-24.

In 1940, DOL revised its regulations governing the white-collar exemptions to ensure their broad sweep. *See supra* pp. 5-6. DOL did this to address employers' concerns about the burdens of the FLSA and to ward off legislative threats to exempt white-collar workers altogether. *Id.* As a result, the administrative exemption became "[o]ne of the broadest and most . . . flexible[] exemptions contained in the [FLSA]", 1 Les A. Schneider & J. Larry Stein, *Wage and Hour Law: Compliance and Practice* § 5:24 (2010). DOL's 2004 Final Rule was designed to reaffirm that the white-collar exemptions were to be applied in a straightforward and expansive manner. Final Rule at 22124-27; *see supra* pp. 6-8.

2. The Second Circuit's decision destroys the balance between exempt and non-exempt employees created by Congress and DOL. The court of appeals has added a new, subjective "greater degree of" discretion and "more" independent judgment test to the administrative exemption—a test that is not found in the FLSA or its regulations. It also has rewritten the outside sales exemption to impose a new "transfer of title" requirement that is contrary to the language and purpose of the FLSA. These new tests narrow the exemptions, contrary to Congress's original intent, and create the exact mischief that

Congress and DOL, prior to the filing of its amicus brief, sought to avoid.

These new requirements are not limited to the pharmaceutical industry or to sales reps. On the contrary, the Second Circuit's unprecedented interpretations of the administrative and outside sales exemptions risk a change in the treatment of nearly one-quarter of the American workforce, *see* U.S. General Accounting Office, *Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place*, 2 (1999) (in 1998, 20-27 percent of the full-time workforce in the United States—19 to 26 million workers—was covered by the white-collar exemptions), and subjects employers across all industries to suit by multiple employees seeking back pay and other damages.

The decision also calls into question a number of existing courts of appeals' interpretations of the FLSA in other industries. *See, e.g.*, *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1047-48 (9th Cir. 2005) (definition of sales in the automobile industry); *Renfro v. Mich. Power Co.*, 370 F.3d 512, 517-19 (6th Cir. 2004) (utility construction planners); *Cowart v. Ingalls Shipbldg., Inc.*, 213 F.3d 261, 267 (5th Cir. 2000) (shipbuilding); *Robinson-Smith v. Gov't Emps. Ins. Co.*, 590 F.3d 886, 892-96 (D.C. Cir. 2010) (insurance adjusters); *Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 13 (1st Cir. 1997) (insurance salespersons).

3. In particular, the Second Circuit's decision will have an immediate and deleterious effect on the pharmaceutical industry. Potential litigants across the country will flock to courts in the Second Circuit

to take advantage of the new regime there, leaving all pharmaceutical companies virtually defenseless because of the similarities in their sales forces. Precedent and earlier victories outside the Second Circuit, most notably in the Third Circuit, will provide no protection against relitigating the exemptions' applicability under the new rule in the Second Circuit: virtually all of those cases were individual lawsuits or opt-in collective actions in which the trial court granted summary judgment before addressing the propriety of class certification. Because, in this context, "[a] single positive trumps all the negatives", *In re Bridgestone/Firestone Tires Prods. Liab. Litig.*, 333 F.3d 763, 766-67 (7th Cir. 2003) (Easterbrook, J.), all pharmaceutical companies, even those that have prevailed to date in other courts, will soon be faced with massive retroactive liability.[10]

A lasting effect of the Second Circuit's decision will be a fundamental alteration in the way in which the pharmaceutical industry has marketed prescription drugs for decades. Converting sales reps—who are central to the way pharmaceutical companies sell their products—from salaried to

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[10] Nor will the impact of the Second Circuit's decision be limited to newly-filed cases—the decision will have ramifications even in individual cases in other jurisdictions in which pharmaceutical companies have previously prevailed. Indeed, on September 28, 2010, the United States District Court for the Southern District of Texas granted plaintiffs' motion for reconsideration in *Harris*, "adopt[ing] the reasoning of the Second Circuit"—including paying controlling deference to DOL's amicus brief—and reversed its earlier holding that sales reps were exempt under both the administrative and outside sales exemptions. *Harris*, No. 07-cv-03938, slip op. at 5.

hourly workers will necessarily lead to a fundamental change in how these companies operate. By tying compensation to hours worked, rather than sales performance, sales reps will lose their incentive to generate profits for their employer. And as hourly workers, sales reps will also lose the flexibility to spend as much time as they feel appropriate to make a sale, thereby reducing opportunities for increased compensation. *See* Steven Blackburn, *In re Novartis Wage and Hour Litigation, in Top 20 Food and Drug Cases, 2009 & Cases to Watch, 2010*, 159, 168 (John B. Reiss ed., 2010). By stripping the sales rep position of these defining qualities, the decision will also make it difficult for pharmaceutical companies to recruit and retain sales reps who prize flexibility, work requiring self-motivation and initiative and opportunities for incentive compensation—the very people who have been successful in this position. *See id.* at 168-69.

II. The Second Circuit's Interpretation of the Administrative Exemption Is Erroneous and Conflicts with Decisions of the Third and D.C. Circuits and DOL Regulations

The FLSA regulations state that the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered". 29 C.F.R. § 541.202(a). An illustrative "non-exclusive" list of factors is used to determine "whether an employee exercises discretion and independent judgment with respect to matters of significance", including, *inter alia*, whether the employee "performs work that affects business

operations to a substantial degree", "has authority to commit the employer in matters that have significant financial impact" and "is involved in planning long- or short-term business objectives". 29 C.F.R. § 541.202(b).

1. The Second Circuit agreed that sales reps evaluate various courses of conduct, make on-the-spot decisions in executing their sales strategies, decide how to allocate their budgets, commit NPC financially by entering into various contracts which may cost NPC thousands of dollars and make judgments about the allocation of samples to physicians—all without direct supervision. App. 32a-35a. Thus, the sales reps met several Section 202(b) factors, which DOL, in the past, has said is enough for the exemption to apply. Final Rule at 22143.

Nonetheless, the court concluded that sales reps are not "*sufficiently* allowed to exercise either discretion or independent judgment in the performance of their primary duties", according controlling deference to DOL's argument that, while sales reps exercised some discretion, "the regulations require a showing of a *greater degree* of discretion and *more* authority to use independent judgment in matters of significance, than [NPC] allows the Reps". App. 33a, 35a (emphases added). Not only was such deference to DOL improper (*see infra* Part IV), but concluding that a "greater degree of" discretion and "more" independent judgment are required to qualify for the exemption is erroneous, flatly contrary to DOL's 2004 Final Rule, *see supra* pp. 6-7, and in conflict with the Third and D.C. Circuits.

2. Though aware of DOL's brief in this case, the Third Circuit in *Smith* concluded that a Johnson & Johnson ("J&J") sales rep was an administrative employee because she "executed nearly all of her duties without direct oversight" and "described herself as the manager of her own business who could run her territory as she saw fit". *Smith*, 593 F.3d at 285. This was so even though she "worked off of a prepared 'message' that J&J provided her" and "J&J gave her pre-approved visual aids and did not permit her to use other aids". *Id.* at 282. In *Baum*, the Third Circuit held that, under a Pennsylvania state law modeled on the FLSA, an AstraZeneca sales rep whose duties were "very similar" to those of the J&J sales rep in *Smith* was covered by the administrative exemption. 2010 WL 1063935, at *9-10. There is no material difference between the job description of NPC's sales reps and the duties and responsibilities of any of the sales reps held exempt in these cases. *See supra* pp. 8-11.

The Second Circuit's decision also conflicts with the D.C. Circuit's application of the liberal standard embodied in DOL's 2004 regulations. In *Robinson-Smith*, the D.C. Circuit reversed a decision which had concluded that although auto damage adjusters exercised "some discretion", the discretion "exercised was not sufficient" to meet the standards of the administrative exemption. 590 F.3d at 890. The D.C. Circuit concluded that while "the parties disagree on how much discretion the adjuster exercises, no one disputes that he exercises 'some'",

and thus the employees were covered by the administrative exemption. *Id.* at 893-95.[11]

3. Although the FLSA's exemptions "are to be narrowly construed against the employers seeking to assert them and their applications limited to those [] plainly and unmistakably within their terms and spirit", *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), this canon does not trump common sense. "To read the FLSA blindly, without appreciation for the social goals Congress sought, would also do violence to the FLSA's spirit." *See Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1307 (11th Cir. 2009) (quoting *Nicholson*, 105 F.3d at 1364). When the statutory language and intent of Congress are clear, this canon of construction does not apply. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007) (*citing A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)); *Mechmet v. Four Seasons Hotel, Ltd.*, 825 F.2d 1173, 1177-78 (7th Cir. 1987) (canon is at best a tie-breaker if regulations or statute do not answer the issue).

The Second Circuit's new rules do "violence to the FLSA's spirit". It is undisputed that NPC's sales reps earn compensation well above the statutory

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[11] DOL and the Second Circuit cite Section 202(e) of the regulations, which deals with employees who follow rote applications of "well-established techniques, procedures or specific standards described in manuals or other sources". 29 C.F.R. § 541.202(e). *Robinson-Smith* and other circuit court decisions have rejected the view that Section 202(e)'s predecessor (29 C.F.R. § 541.207(b) (2004)) barred application of the administrative exemption to employees who exercise only "some" discretion and independent judgment. 590 F.3d at 893-94 (citing cases).

minimum for this exemption and engage in daily work outside the office, free from supervision. They do not track their time, and the nature of their job would make it difficult to monitor any effort to do so. It is also undisputed that the reps' compensation structure rewards them based on their efforts in increasing sales in their territories. Their work directly affects NPC's primary business operation—the sale of pharmaceutical products. They are precisely the type of worker contemplated by the white-collar exemptions. *See Nicholson*, 105 F.3d at 1364.

III. The Second Circuit's Rejection of the Outside Sales Exemption Conflicts with the FLSA and DOL's Own Regulations and Is At Odds with Decisions from Other Circuit Courts

DOL broadly defines an outside sales employee as one whose primary duty is: "(i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders". 29 C.F.R. § 541.500(a). Under Section 3(k) of the statute, "'[s]ale' or 'sell' *includes any* sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*". 29 U.S.C. § 203(k) (emphases added). This definition of sales applies throughout the FLSA. *See* 29 U.S.C. § 203. The Second Circuit erred in concluding that sales reps do not come within the scope of the exemption.

1. The plain meaning and purpose of the statute clearly supports the application of the outside sales exemption here. The statutory language is expansive. The word "includes" is a term of

enlargement, therefore the definition is illustrative, not all-inclusive. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 & n.10 (2010). Moreover, the term "other disposition", the Second Circuit agreed, "is a catch-all that could have an expansive interpretation". App. 26a. The exemption is premised on the idea that the individual nature and quality of an outside salesperson's work, and entitlement to commission-based incentive compensation, does not warrant the protection of overtime wages:

> Such salesman . . . works individually . . . . In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941). Petitioner's sales reps clearly meet these criteria.

2. The court of appeals' narrow interpretation that sales require a transfer of ownership takes the FDCA's requirement of a physician's prescription for drug sales—intended to protect patients from the use of inappropriate or unsafe drugs[12]—and turns it on

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[12] *See* Krista Hessler Carver, *A Global View of the First Amendment Constraints on FDA*, 63 *Food & Drug L. J.* 151, 211 n.540 (2008) (21 U.S.C. § 353(b)(1) "rel[ies] on physician's

its head to require the reclassification of thousands of employees. This overly technical construction is at odds with the decisions of other circuits, which reject an overly formalistic approach in favor of one that accounts for the economic realities of the industries at issue and the expansive language of the exemption itself. The Ninth and Tenth Circuits have held that leases are sales under the FLSA, even though no transfer of title is involved. *See Gieg*, 407 F.3d at 1047-49; *Brennan v. Dillon*, 483 F.2d 1334, 1337 (10th Cir. 1973). The Eleventh Circuit has held, based on economic realities and the plaintiff's receipt of commissions, that obtaining orders and referring customers to the employer insurance company without consummating the insurance contract is selling under the outside sales exemption. *Gregory*, 555 F.3d at 1303, 1308-10. Here, the sales reps make sales as they are made in the pharmaceutical industry, and they earn incentive compensation tied to sales within their territories, even if they cannot legally transfer title under the governing FDA regulations. *Cf. Medtronic, Inc. v. Benda*, 689 F.2d 645, 648, 653 (7th Cir. 1982), *cert. denied*, 459 U.S. 1106 (1983) (medical device sales reps sold to physicians because physicians were the "real" purchasers).

3. The Second Circuit's and DOL's interpretation of the exemption is inconsistent with the position DOL has taken for almost 70 years. As DOL explained in 2004, outside salesmen are exempt because they have "salaries well above the minimum wage", "above average fringe benefits and better

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supervision to render safe the use of drugs that would otherwise be unsafe").

opportunities for advancement", their jobs are "difficult to standardize to any time frame" and cannot "be easily spread to other workers after 40 hours in a week". Final Rule at 22123. In its 1940 report, DOL also articulated a list of factors to be considered in determining whether an employee qualifies as an "outside salesperson", which include whether the employer advertised the position as a sales job, the "qualifications [set by the employer] for hiring, [the employee's] sales training [and] the method of payment" of the employee. Stein Report at 51-52. Indeed, as recently as February 2010, DOL's Bureau of Labor Statistics specifically classified pharmaceutical sales reps as employees who "*sell* goods" for wholesalers or manufacturers where technical or scientific knowledge is required. U.S. Bureau of Labor Statistics, *Standard Occupational Classification Definitions* 41-4011 (2010) (emphasis added).[13]

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[13] DOL's position is at odds with the Department of Justice's view, in enforcing the off-label marketing provisions of the FDCA, that sales reps "sell" drugs. *See, e.g.*, Dep't of Justice, Press Release, Pharmaceutical Company Cephalon to Pay $425 Million for Off-Label Drug Marketing (Sept. 29, 2008) (company "structured its sales quota and bonuses in such a way that sales representatives could reach their sales goals only if they promoted *and sold* the drugs for off-label uses") (emphasis added).

IV. The Court Should Grant the Petition To Clarify the Application of *Auer* Where an Agency's Position, Advanced Without Notice-and-Comment Procedures, Reinterprets Unambiguous Regulations, Thereby Causing Unfair Surprise

1. The Second Circuit's analysis as to why DOL's newly-minted views were entitled to controlling deference began and ended with its citation to *Auer*. *See* App. 17a. That the court would conclude that an agency's informal expression of its position was entitled to dispositive deference on such a cursory basis—in a case involving significant economic effects and long-standing policies advanced after notice-and-comment rulemaking—demonstrates that this Court's guidance is needed. *Auer* deference certainly has a place in the Court's administrative law jurisprudence. However, it requires appropriate bounds to ensure that the use of amicus briefs does not improperly substitute for rulemaking and other formal agency processes that assure notice to regulated parties, the opportunity for public participation and political accountability. *Auer* cannot be a rubber stamp. This case presents a needed opportunity for the Court to make clear that there are limitations on *Auer* deference and to give guidance as to the application of those limits.

This is an important and recurring issue—important because the views of administrative agencies have a significant impact on American industries, and recurring because of the prevalence of agency interpretations advanced in amicus briefs and through other informal means. Indeed, DOL's amicus brief below stems from a program it

announced in 2004 to intervene in private FLSA litigations expressly because it expected that federal courts will defer to those interpretations. 13 No. 6 *FLSA Emp. Exemption Handbook News*, 16 (June 2008).

2. In *Auer*, an FLSA case involving the interpretation of the salary-basis test for calculating whether employees come within the scope of a white-collar exemption, the Court requested an amicus brief from DOL to address the appropriate scope of that rule. "Because the salary-basis test is a creature of the Secretary's own regulations", the Court reasoned that DOL's interpretation of it "is controlling unless 'plainly erroneous or inconsistent with the regulation'". *Auer*, 519 U.S. at 461. The Court has held that such deference is warranted only when the agency interprets its own ambiguous regulations. *See id.* at 461; *see also Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous.").[14] That DOL's interpretation took the form of an amicus brief, rather than legally binding rulemaking, did not "in the circumstances of [that] case, make it unworthy of deference". *Auer*, 519 U.S. at 462. Critically, the Court determined that DOL's position was reasonable, in part, because it "avoids the imposition of massive and unanticipated overtime liability". *Id.* at 461.

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[14] The Court has also held that an agency's interpretation does not warrant *Auer* deference where the relevant regulations mirror the statutory language and "give[] little or no instruction on a central issue in th[e] case". *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006).

Recently, in *Long Island Care at Home, Ltd. v. Coke*, the Court revisited the scope of deference to informal agency interpretations that could cause such disruption. In *Coke*, DOL had issued conflicting regulations and interpretations concerning the treatment under the FLSA of employees paid by third parties to provide home health care—a large and growing industry in this country. 551 U.S. 158, 162 (2007). The Court deferred to DOL's most recent position adopting one interpretation of two conflicting regulations, but importantly noted that deference to such agency interpretations would be appropriate only "as long as interpretative changes create no unfair surprise". *Id.* at 170. The Court did not give guidance on how to apply this standard, although it noted that the standard was met in that case because DOL announced its latest position in a notice-and-comment rulemaking procedure. *Id.* at 170-171; *see also Christensen*, 529 U.S. at 588 (cautioning that courts should be wary of informal agency interpretations that create "*de facto* a new regulation" by ignoring clear pre-existing regulatory language).

Prior to *Coke*, a leading academic commentator urged the Court to articulate a "fair notice" limitation on *Auer*. *See* Richard J. Pierce, Jr., *Democratizing the Administrative State*, 48 *Wm. & Mary L. Rev.* 559, 607-08 (2006); *see also* Thomas L. Casey, III, *Towards Function and Fair Notice*, 2008 *Mich. St. L. Rev.* 725, 737-48 (2008) (concluding that *Coke* adopted a fair notice limitation).[15] Since *Coke*,

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[15] Other academic commentators have gone further and urged the Court to abrogate *Auer* entirely. *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference:*

two circuit courts have discussed the impact of "unfair surprise" on *Auer* deference—with diverse results. *See Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461-62 (4th Cir. 2007) (no deference for DOL's interpretation of Family Medical Leave Act advanced in an amicus brief because it was inconsistent with preamble accompanying regulations at issue; no discussion of *Coke*); *id.* at 464 (Duncan, J. dissenting) (applying *Coke* and claiming no unfair surprise because agency issued notice, after oral argument in the appeal, that it was considering changing its position); *Boose v. Tri-Cnty. Metro. Trans. Dist. of Or.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009) (no unfair surprise under *Coke* because agency attempted to change its position through notice and comment rulemaking); *Pub. Citizen v. NRC*, 573 F.3d 916, 923-24 (9th Cir. 2009) (no unfair surprise because agency is merely "elaborating on" interpretations of its regulations). Other circuits have also expressed doubts about the extent of *Auer*'s reach. *See Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003) (questioning rationale of *Auer*); *Mich. Bell Tel. Co. v. Covad Commc'ns Co.*, 597 F.3d 370, 375 n.6 (6th Cir. 2010) (same).

3. This case presents substantial problems of fair notice and economic disruption. In 1945, DOL

The Supreme Court Treatment of Agency Statutory Interpretations from Chevron *to* Hamdan, 96 *Geo. L. J.* 1083, 1184 (Apr. 2008) (Court should abrogate *Seminole Rock* and its progeny); Kristen E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 *Colum. L. Rev.* 1235, 1294 (Oct. 2007) (*Skidmore* deference more appropriate for informal agency interpretations of regulations); Thomas W. Merrill & Kristen E. Hickman, Chevron's *Domain*, 89 *Geo. L. J.* 833, 900 (Apr. 2001) (same).

issued an opinion letter concluding that sales reps were exempt. In the intervening 64 years, the agency never issued a contrary pronouncement, never brought an enforcement action concerning sales reps, and never issued audit findings challenging the industry's treatment of these employees—even after the issue became the subject of litigation in 1982 and the exemptions were revisited and revised in 2003-2004. There is little question that it was an "unfair surprise" upsetting settled expectations when DOL, without notice, intervened here and reversed this history. While it "is possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing . . . a more plausible hypothesis is that the . . . industry has been left alone because the character of its compensation system" does not violate the FLSA. *Yi*, 480 F.3d at 510-11. Nor can there be doubt that the effect of the Second Circuit's decision on the pharmaceutical industry will be substantial: it will impose massive retroactive liability—the precise opposite effect of the DOL position deferred to in *Auer*—and significantly change the defining characteristics of its sales force. *See supra* Part I.3. Such disruption is a relevant factor in assessing the extent of deference owed to an agency's informal interpretation. *Cf. Singh v. City of New York*, 524 F.3d 361, 369-70 (2d Cir. 2008) (Sotomayor, C.J.) (noting that the "wide-ranging impact" on businesses was a relevant factor in rejecting plaintiffs' proffered interpretation of the Portal-to-Portal Act, where such interpretation would "suddenly impos[e] upon businesses across the country a liability to compensate employees" that no court had imposed in 60 years).

DOL also created unfair surprise by abandoning its positions in the 2004 Final Rule, where it clearly stated that employees came within the scope of the administrative exemption if their work satisfies at least two or three of the factors identified in 29 C.F.R. § 541.202(b), and codified the holdings of federal cases to simplify the application of the exemption. Final Rule at 22142-44. Instead of adhering to those views here, DOL grafted a new, subjective "greater degree of" discretion and "more" independent judgment test onto the administrative exemption that has no basis in the regulations. Similarly, DOL's brief reinterprets the outside sales exemption to impose a specific "consummated transaction" test that is at odds with the regulations. In doing so, DOL ignored the 2004 Final Rule's definitive statement that the outside sales exemption only required that a sale "in some sense" take place. Final Rule at 22162 (reiterating DOL's statements in the 1940 Stein Report). Thus, through the informal means of an amicus brief, DOL has written "de facto a new regulation", *Christensen*, 529 U.S. at 588, that imposes "unfair surprise", *Coke*, 551 U.S. at 159, 170-71, on the regulated community. *See also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (deference inappropriate if alternative reading is compelled by "other indications of the Secretary's intent at the time of the regulation's promulgation") (internal quotations and citation omitted); *Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 737 (3d Cir. 1999) (Alito, C.J.) ("An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning") (citation omitted).

According *Auer* deference when an agency brief advances a new reading of a critical feature of a major regulatory regime strikes at fundamental principles of fairness. Strong deference to such critical changes is inappropriate absent notice-and-comment procedures. *See KPMG, LLP v. SEC*, 289 F.3d 109, 116-17 (D.C. Cir. 2002) (explaining in *dictum* that the court could not defer to SEC's interpretation of its regulations if doing so would impose a penalty on an individual without fair notice) (citation omitted). As the Seventh Circuit noted in *Doe v. Mutual of Omaha Insurance Co.*, when an agency advances a "radically expansive" and "far-reaching" interpretation of its regulations that threatens a sea change in an entire industry, courts are "justif[ied] . . . in requiring the Department to invite deference by a more deliberative, public, and systematic procedure than the filing of an amicus brief". 179 F.3d 557, 561, 563 (7th Cir. 1999).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

October 4, 2010

Respectfully submitted,

RANDOLPH S. SHERMAN
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

KERRY ALAN SCANLON
WILLIAM HOFFMAN
Kaye Scholer LLP
901 15th Street NW
Washington, DC 20005
(202) 682-3500

EVAN R. CHESLER
Counsel of Record
DARIN P. MCATEE
REBECCA R. SILBER
LINDSAY J. SMITH
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
echesler@cravath.com

Counsel for Petitioner

APPENDIX

Supreme Court, U.S.
FILED

10-460 OCT 4 - 2010

OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

NOVARTIS PHARMACEUTICALS CORPORATION,
Petitioner

v.

SIMONA M. LOPES, CATHERINE E. WHITE, *ET AL.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

RANDOLPH S. SHERMAN
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 836-8000

KERRY ALAN SCANLON
WILLIAM HOFFMAN
Kaye Scholer LLP
901 15th Street NW
Washington, DC 20005
(202) 682-3500

EVAN R. CHESLER
Counsel of Record
DARIN P. MCATEE
REBECCA R. SILBER
LINDSAY J. SMITH
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, NY 10019
(212) 474-1000
echesler@cravath.com

Counsel for Petitioner

October 4, 2010

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09-0437-cv
In re Novartis
Wage and Hour
Litigation

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

. . . . . .

August Term, 2009

(Argued: February 19, 2010 Decided: July 6, 2010)

Docket No. 09-0437-cv

In re NOVARTIS WAGE AND HOUR LITIGATION

Before: KEARSE and HALL, Circuit Judges, RAKOFF, District Judge*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Paul A. Crotty, Judge, dismissing claims of pharmaceutical company sales representatives for overtime pay under the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., and state law, finding that such representatives fell within exemptions for

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* Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

outside salesmen and for administrative employees exercising discretion and independent judgment. See 593 F.Supp.2d 637 (2009).

Vacated and remanded.

JEREMY HEISLER, New York, New York (David W. Sanford, Katherine M. Kimpel, Sanford, Wittels & Heisler, Washington, D.C., Steven Wittels, Andrew Melzer, Sanford, Wittels & Heisler, New York, New York, on the brief), for Plaintiffs-Appellants.

RICHARD H. SCHNADIG, Chicago, Illinois (Vedder Price, Chicago, Illinois, Jonathan A. Wexler, Vedder Price, New York, New York, on the brief), for Defendant-Appellee.

JENNIFER R. MARION, United States Department of Labor, Washington, D. C. (Carol A. De Deo, Deputy Solicitor for National Operations, William C. Lesser, Deputy Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, United States Department of Labor, Washington, D. C., on the brief), for Amicus Curiae Secretary of Labor in support of Plaintiffs-Appellants.

OUTTEN & GOLDEN, New York, New York (Justin M. Swartz, Rachel Bien, Outten & Golden, New York, New York, Catherine K. Ruckelshaus, National Employment Law Project, New York, New York, George A. Hanson, Bradley T. Wilders, Stueve Siegel Hanson, Kansas City, Missouri, Rebecca M. Hamburg, National Employment Lawyers Association, San Francisco, California, Richard J. (Rex) Burch, Bruckner Burch,

Houston, Texas, of counsel), filed a brief on behalf of Amicus Curiae National Employment Lawyers Association in support of Plaintiffs-Appellants.

PAUL, HASTINGS, JANOFSKY & WALKER, Washington, D.C. (Neal D. Mollen, Paul, Hastings, Janofsky & Walker, Washington, D.C., Robin S. Conrad, Shane B. Kawka, National Chamber Litigation Center, Washington, D.C., of counsel), filed a brief on behalf of Amicus Curiae Chamber of Commerce of the United States of America in support of Defendant-Appellee.

KEARSE, Circuit Judge:

In these consolidated class actions, the plaintiffs, current or former pharmaceutical sales representatives employed by defendant Novartis Pharmaceuticals Corporation ("Novartis"), appeal from a judgment of the United States District Court for the Southern District of New York, Paul A. Crotty, Judge, denying their claims under the Fair Labor Standards Act of 1938 ("FLSA" or the "Act"), 29 U.S.C. § 201 et seq., and state law, for overtime pay with respect to time worked in excess of 40 hours per week. The district court granted Novartis's motion for summary judgment on the ground that plaintiffs are outside salesmen and/or administrative employees who are exempted from the FLSA's overtime pay requirements. On appeal, plaintiffs contend that the district court did not properly apply the exemption standards set out in regulations promulgated under the FLSA by the United States Secretary of Labor (the "Secretary"), see 29 C.F.R. §§ 541.200-541.204, 541.500-541.504. The Secretary, appearing as amicus curiae, endorses that

contention. For the reasons that follow, we agree with plaintiffs and the Secretary; we thus vacate the judgment of the district court.

I. BACKGROUND

Novartis researches, manufactures, markets, and sells pharmaceuticals. The plaintiffs are some 2,500 persons who were employed by Novartis at various times between March 23, 2000, and April 7, 2007, as sales representatives ("Reps") in California or New York, and who are parties to class actions in the United States District Courts for the Central District of California or the Southern District of New York, respectively, along with Reps employed by Novartis in other states during that period who have opted to join these actions. The actions were consolidated in the Southern District of New York by the Judicial Panel on Multidistrict Litigation for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. Plaintiffs alleged principally that under the FLSA and state law, they were entitled to overtime pay at the rate of one and one-half times their normal compensation for time worked in excess of 40 hours per week. The following facts are not in dispute.

A. Novartis's Use of Pharmaceutical Sales Representatives

To market its pharmaceuticals, Novartis has a team of "brand" managers who, cognizant of limitations imposed by the United States Food and Drug Administration ("FDA") , devise descriptions of the essential features of each Novartis drug. Marketing managers assist in the production of

written promotional materials. Novartis has regional managers who are involved in hiring, firing, and business planning decisions, including working on marketing strategy with the marketing team. Reporting to the regional managers are district managers who supervise the Reps.

Under federal regulations, Novartis is prohibited from selling its prescription drugs directly to patients. Instead, Novartis typically sells its products to wholesalers, which sell them to individual pharmacies. Physicians write prescriptions that permit patients to purchase those products from pharmacies. Novartis employs some 6,000 Reps nationwide and assigns them to make what Novartis characterizes as "sales" calls on physicians.

Reps do not sell the Novartis products to physicians. Although Novartis advertises openings for Reps as sales positions, the Reps' duties do not include "the exchange of good[s] or services, contracting to sell any good or service, consigning for the sale of any good or service, or obtaining orders or contracts for the use of facilities." (Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment ¶ 107; Defendant Novartis Pharmaceuticals Corporation's Responses to Plaintiffs' Rule 56.1 Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment ¶ 107.) Rather, in visits typically lasting no longer than five minutes, the Reps provide physicians with information about the benefits of particular Novartis pharmaceuticals and encourage the physicians to prescribe those products. Reps give physicians

reprints of clinical studies reporting findings about the Novartis products. Reps also inform doctors as to whether Novartis products are among those for which insurers will pay, resulting in little or no cost to patients. The Reps give the physicians samples of drugs; these samples are not sold, and no money is exchanged. Indeed, selling drug samples is a federal crime. See 21 U.S.C. §§ 353 (c)(1), 333 (b)(1)(B). The goal of the Reps is to get physicians to say they will prescribe Novartis products for their patients.

To enable the Reps to reach that goal, Novartis puts them through a training program for several weeks. The training is extensive, ranging from instruction on the medical benefits of each Novartis drug--and the way in which Reps should present favorable scientific studies--to matters of technique as detailed as how they should hold their pens when showing Novartis's written material to physicians.

In the training program, a Rep is taught how to question physicians to determine why they may be hesitant about prescribing Novartis products and then to offer arguments to overcome their reluctance. Novartis instructs the Reps on four "social styles" that a given individual may have in interacting with others and teaches the Reps how to tailor their presentations to a physician's particular social style. Novartis has also hired consultants to observe its most successful Reps and incorporate their techniques into the training program.

Novartis sets the number of times per trimester a Rep must call on each physician and how often specific drugs should be promoted. For each product in each trimester, Novartis has a principal

marketing message--its "core message"--developed by the Novartis brand managers, which Reps are instructed to convey to physicians on each call. Novartis gives the Reps written promotional materials developed by its brand and marketing managers, including posters, brochures, and laminated cards, to use on sales calls. The Reps do not play any part in formulating the core message or the written materials; nor do they play any part in devising Novartis's advertising. During training, Reps are required to engage in role-playing, using scripts to practice delivering the core message and parrying objections from physicians.

Although the Novartis training material encourages the Reps to tailor their pitches to an individual physician, they are not allowed to deviate from the core message. They are not allowed to use any written materials other than those provided by Novartis. One Rep testified that Reps were expected to act like "robots" because of the limitations on what they could say during sales calls. If a physician asks a Rep a medical question for which Novartis has not prepared an answer, the Rep is required to refer the doctor to Novartis's medical department.

The Reps report to their district managers by telephone at least every week or two, and sometimes report or confer daily. In addition, once or twice a month, the district managers accompany the Reps on their visits to physicians. During these ride-alongs, the managers observe the Reps' meetings and critique their performance. Reps receive negative reviews if they deliver the Novartis core message in a way that violates FDA-imposed limitations or Novartis policies.

As the Reps do not make sales, they are trained to end their meetings with physicians with a "closing" in which they may ask, "Doctor, will you prescribe this product for your patients who suffer from [the appropriate medical conditions]?" They may also ask, "Doctor, do I have your commitment to prescribe it [?]" One Novartis district manager described this type of colloquy as a "persuasive sale" but acknowledged that there was no way to know whether any physician actually followed through on such a commitment. One Rep stated that a physician might answer affirmatively just to get the Rep out the door.

As to physicians who refuse to entertain office visits from Reps, Novartis instructs the Reps to use other techniques to make contact, such as showing up at hospitals early in the morning before medical rounds. Reps also organize meals and other programs for physicians where speakers promote Novartis products. For such programs, Novartis maintains a list of cooperating doctors, from which Reps must book speakers. Reps manage the budgets for these events, but do so within limits set by Novartis managers; Novartis sets a minimum number of such events that it expects each Rep to hold.

Novartis does not know how many prescriptions individual physicians write for its products. It subscribes to several services that provide it with information as to when prescriptions for Novartis products are filled at pharmacies that report such information to the services; this information identifies the prescribing physicians. Because the data are gathered from pharmacies, however, these

reports represent only the number of prescriptions the reporting pharmacies filled, not all the prescriptions actually written. Further, because some 19,000 pharmacies do not report sales to these services, Novartis has data for only about 72% of all filled prescriptions. Novartis extrapolates from the reported sales in order to estimate the sales at non-reporting pharmacies, and it believes those estimates generate a fairly accurate picture of how many prescriptions are being filled at non-reporting pharmacies; however, the latter prescriptions cannot be traced to particular physicians.

Notwithstanding the absence of actual information as to the numbers of prescriptions for Novartis drugs written by particular physicians, the Reps, whose base wages are at least $455 a week, receive up to a quarter of their compensation as bonuses based on their performance with physicians. Given the limits of its ability to monitor physicians' actual prescriptions, Novartis sets goals for the number of prescriptions it hopes to have filled in a particular territory, and it pays a Rep a bonus when the number of filled prescriptions attributable to physicians in the Rep's territory exceeds the goal Novartis has set. Some Novartis Reps earn more than $100,000 a year. In 2005, Novartis Reps' total compensation averaged $91,539.

The FLSA provides that many employees must be paid one and one-half times their regular rate of compensation for time worked in excess of 40 hours a week, see 29 U.S.C. § 207(a)(1), but provides that certain categories of workers are excluded from this requirement, see id. § 213. Novartis Reps are expected to be in the field from 8 a.m. to 5 p.m. on

work days; they eat lunch with physicians or while driving to or from their physician visits; and they attend the mandatory dinner programs, which sometimes prevent them from returning home before 9 or 10 p.m. Notwithstanding a standard week of five such nine-hour days plus the occasional evening work, Novartis does not give its Reps overtime pay. As is the practice throughout the pharmaceuticals industry, Novartis treats its Reps as exempt from the overtime pay requirement in the FLSA, as well as from comparable state-law requirements.

B. The Decision of the District Court

In the consolidated proceedings, Novartis moved for summary judgment dismissing the complaints on the ground that plaintiffs were "outside salesm[e]n" and/or "administrative" employees, 29 U.S.C. § 213(a)(1), and thus exempt from the overtime pay provisions of FLSA and state labor laws. Novartis also argued that those Reps who earned more than $100,000 a year were exempt under 29 C.F.R. § 541.601 (entitled "Highly compensated employees"). Plaintiffs cross-moved for partial summary judgment ruling that they are not in an exempt category.

Ruling that it need not determine whether any Reps were exempt as highly compensated employees, the district court denied plaintiffs' motion and granted Novartis's motion on the ground that the "Reps are not entitled to overtime compensation because they are exempt from coverage as outside salespersons under the FLSA and state laws, and even if they are not outside salespersons, they are administrative employees and are still exempt." In re

Novartis Wage & Hour Litigation, 593 F.Supp.2d 637, 640 (S.D.N.Y. 2009) ("Novartis I").

With respect to the contention that the Reps were exempt as outside sales employees, see 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.500, the district court reasoned that the Reps met the spirit and the letter of that exemption. It stated that excluding Reps from the exemption merely because they may not "'sell'" in a "technical[]" sense, Novartis I, 593 F.Supp.2d at 649 (citing Jewel Tea Co. v. Williams, 118 F.2d 202 (10th Cir. 1941)), would "ignore[] the Act's spirit, purpose, and goals." Novartis I, 593 F.Supp.2d at 648. The court stated that

> Jewel Tea teaches that outside salespersons are exempt from the overtime requirement not because they "sell," as that term is technically defined, but rather because they (1) generate commissions for themselves through their work and (2) work with minimal supervision, making adherence to an hours-based compensation scheme impractical.

Novartis I, 593 F.Supp.2d at 648-49 (emphasis added). The court also found that Reps do make sales for Novartis ("NPC"), stating as follows:

> Legally, Reps cannot sell NPC drugs directly to physicians. . . . Further, physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that they cannot make a binding commitment to a Rep to prescribe certain NPC products. . . .

> Nevertheless, . . . the physicians called upon by Reps ultimately control the purchase of NPC products by writing prescriptions. . . . [A]bsent a prescription from a doctor, the patient end-users of NPC drugs are not able to obtain those drugs. NPC spends in excess of $500 million annually to have its Reps meet on a frequent and repeat basis with these physicians to seek their commitments to prescribe NPC products. In other words, Reps make sales in the sense that sales are made in the pharmaceutical industry.

Id. at 650 (emphases added).

Rejecting plaintiffs' contention that the Reps do not make sales because sales of pharmaceuticals are made only by manufacturers to wholesale distributors, then by distributors to pharmacies, and finally by pharmacies to patients, the district court stated that

> [t]he Court cannot ignore reality. Distributors are not the end-users of NPC's products. If physicians did not prescribe NPC products, patients would be unable to buy them and distributors would have no incentive to make purchases from NPC. The purchase cycle commences with a prescription from physicians, who are therefore the appropriate target of the Reps' sales efforts. When the physician writes a prescription for the NPC product, then a sale can take place.

Id.

With respect to the exemption for administrative employees, see 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.200, 541.202, the district court concluded that the Reps also fell within that category, stating that they earn in excess of $455 a week, "they engage in work that is directly related to the management or general business operations of NPC and they exercise discretion and independent judgment with respect to matters of significance." Novartis I, 593 F.Supp.2d at 655. The district court concluded that Reps are engaged in work related to the management or general business operations of Novartis because Reps are not engaged in the production of Novartis pharmaceuticals and because the Reps are critical to dissemination of information about Novartis products:

> Reps meet with physicians and provide them with information about NPC drugs in an attempt to persuade the physicians to write prescriptions for those drugs. The Reps' success in obtaining prescriptions is critical to NPC's business. The sizeable incentive payments made to Reps for generating prescriptions, as well as the more than $500 million paid to the 6,000 Reps, buttress[] the conclusion that obtaining prescriptions for its drugs is critical to NPC's success. There is no other rational explanation for the commitment of this level of financial resources to NPC's sales effort.

Id. at 656. The court concluded that Reps exercise "discretion and independent judgment with respect to matters of significance" because

> Reps are expected to use initiative to increase the number of prescriptions written for their drugs--oftentimes, this involves building a good rapport with the physicians and their staffs. Within the confines of the "core messages" created by NPC, Reps must decide how best to present their information and must determine what type of "close" is most appropriate in a given situation. This, of course, depends on how much time the physician will allow the Rep, the physician's patient base and prescribing history, and numerous other factors. Reps set their daily call schedules and are expected to use their entertainment budgets to host informational events for the physicians on their target lists. In carrying out these activities, they are quite clearly attempting to increase prescriptions for their drugs--a matter of considerable significance for NPC.

Id. at 657. The district court was unpersuaded that Novartis's training and expectations rendered Reps "robots" or automatons who did not exercise significant discretion:

> These labels are not facts, but merely arguments designed to avoid the overtime exemptions. They do not begin to answer why or how a robot or an automaton could or should earn an average salary of $91,500 per year. Nor do they explain why NPC would employ 6,000 Reps at a cost in excess of half a billion dollars per year. They are an attempt to avoid the consequences of

> what Reps do every day--arranging to call on physicians and, after assessing how much time is available for the call, choosing the best possible approach to convince the physician to prescribe NPC drugs the next time an appropriate patient opportunity presents itself. NPC pays a good salary and material incentives to encourage this behavior. Reps are given drug samples, printed materials, and core messages. They are dispatched to the offices of physicians in an attempt to convince those physicians to prescribe NPC products. It defies logic to accept that, in such a situation, Reps are expected to do nothing but chant slogans and mouth platitudes. At the bare minimum, Reps must be capable of tailoring their presentation to a given timeframe--deciding how best to convey the "core message" in a manner that will have the desired effect on the physician. Such a decision involves making an independent judgment, free of direct oversight, even if NPC has provided Reps with guidelines for conveying certain information in a certain manner. Thus, while the exact nature of the discretion and independent judgment exercised by Reps may be in dispute, . . . on the present facts, NPC's Reps have discretion and exercise independent judgment.

Id.

Accordingly, having found both the outside salesman and administrative employee exemptions

applicable, the district court granted Novartis's motion for summary judgment dismissing plaintiffs' claims under the FLSA. In addition, finding that the New York overtime pay exemptions were defined and applied in the same manner as those in the FLSA, see Novartis I, 593 F.Supp.2d at 646, and that California law, although differing slightly in the ways it defined the exemption, was "essentially the same as the FLSA and New York law," id. at 647, the court granted summary judgment dismissing plaintiffs' state-law claims.

This appeal followed.

II. DISCUSSION

On appeal, the Reps contend principally that the district court erred in concluding that they are outside sales employees, given that the "[t]he undisputed evidence in this case shows that the Reps do not obtain orders, form contracts, or engage in any type of sale as that term is defined by the FLSA" (Plaintiffs' brief on appeal at 46), and in concluding that Reps are administrative employees given that "[t]hey lack discretion and independent judgment within [the] meaning of the administrative exemption" (id. at 63). Novartis defends the district court's conclusions, arguing that Reps make sales "in the only practical sense applicable to the pharmaceuticals industry" (Novartis brief on appeal at 27), and that, in so doing, the Reps exercise discretion and independent judgment (see id. at 48-55).

The Secretary of Labor, participating in this appeal as an amicus curiae in support of the Reps,

points out that Department of Labor ("DOL" or "Department") regulations promulgated under the FLSA (a) provide, in pertinent part, that an "outside salesman" is one who, inter alia, has the primary duty of "making sales," and (b) provide that an exempt "administrative" employee is one who, inter alia, exercises discretion and independent judgment with respect to matters of significance. The Secretary contends that because the Reps do not make sales or obtain orders and do not exercise discretion and independent judgment, they are not within the "outside salesman" or the "administrative" employee categories that are exempted from the FLSA overtime pay requirements. Novartis argues that the Secretary's interpretations are contrary to the regulations themselves. The United States Chamber of Commerce has filed a brief as amicus curiae in support of Novartis, citing Gonzales v. Oregon, 546 U.S. 243, 257 (2006), and arguing that the Secretary's interpretations are not entitled to deference, on the theory that the regulations merely parrot the FLSA's language and that the Secretary is thus interpreting only the words of Congress, not those of the regulations.

For the reasons that follow, we conclude that the Secretary's regulations define and delimit the terms used in the statute; that under those regulations as interpreted by the Secretary, the Reps are not outside salesmen or administrative employees; and that the Secretary's interpretations are entitled to "controlling" deference, Auer v. Robbins, 519 U.S. 452, 461 (1997) .

A. The FLSA's Overtime Pay Requirement

Congress enacted the FLSA in 1938 to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." FLSA § 2 (a), 29 U.S.C. § 202 (a). Section 7(a)(1) of the FLSA provides, in pertinent part, that

> no employer shall employ any of his employees who in any workweek . . . is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (emphases added). To the extent pertinent to this appeal, FLSA § 13(a)(1) exempts from that overtime pay requirement

> any employee employed in a bona fide . . . administrative . . . capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary[)].

29 U.S.C. § 213(a)(1) (emphases added). The FLSA definitions section provides that

> "[s]ale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

FLSA § 3(k), 29 U.S.C. § 203(k).

"The overtime requirements of the FLSA were meant to apply financial pressure to 'spread employment to avoid the extra wage' and to assure workers 'additional pay to compensate them for the burden of a workweek beyond the hours fixed in the act.'" Davis v. J.P. Morgan Chase & Co., 587 F.3d 529, 535 (2d Cir. 2009) (quoting Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942), superseded by statute, Portal-to-Portal Pay Act of 1947, ch. 52, 61 Stat. 84). Because the FLSA is a "remedial law," Reiseck v. Universal Communications of Miami, Inc., 591 F.3d 101, 104 (2d Cir. 2010), exemptions to the overtime pay requirement are "'narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.'" Bilyou v. Dutchess Beer Distributors, Inc., 300 F. 3d 217, 222 (2d Cir. 2002) (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)). The burden of proving that employees fall within such an exemption is on the employer. See, e.g., Bilyou v. Dutchess Beer Distributors, Inc., 300 F.3d at 222.

We review de novo a district court's grant or denial of summary judgment, viewing the record in the light most favorable to the party against whom summary judgment is sought. See, e.g., Dillon v. Morano, 497 F.3d 247, 251 (2d Cir. 2007). Whether the duties of a job qualify an employee for a FLSA exemption is a question of law, which we review de novo. See, e.g., Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986); Zheng v. Liberty Apparel Co., 355 F.3d 61, 76 (2d Cir. 2003).

B. The "Outside Salesman" Exemption

Pursuant to her statutory mandate to "define[] and delimit[]" the terms "outside salesman" and "administrative" employee, 29 U.S.C. § 213(a)(1), the Secretary has promulgated several regulations. Regulations issued in 2004 provide, inter alia, that "[a] job title alone is insufficient to establish the exempt status of an employee," 29 C.F.R. § 541.2; rather, that status may be determined only on the basis of the employee's "salary and duties," id. With respect to "outside salesman," the regulations provide as follows:

> (a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.
>
> (b) . . . . In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction

> with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

Id. § 541.500 (emphases added). Elaborating on the meaning of sales of commodities, as contrasted with sales of services or the use of facilities, the regulations provide that

> [s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3 (k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 C.F.R. § 541.501 (b) (emphasis added).

The regulations go on to describe the circumstances in which an employee's efforts to "promot[e]" a product constitute--or do not constitute—"sales" within the meaning of the regulations:

> (a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside

> sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. . . .
>
> (b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotional activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

Id. §§ 541.503 (a)-(b) (emphases added).

As described in the preamble to the 2004 DOL regulations, these rules had their origins in regulations adopted after DOL hearings conducted in the 1940s (resulting in a 1940 "Stein Report" and a 1949 "Weiss Report"), see Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22124 (Apr. 23,

2004) ("2004 Final Rule" or "Final Rule"). The Final Rule's preamble ("Preamble") discussed whether an outside employee's promotional activities qualify him as a "salesman" and emphasized that no one could be considered a salesman within these regulations unless he in some sense made a sale.

Addressing concerns expressed by such groups as the Grocery Manufacturers Association, the National Association of Manufacturers, and the U.S. Chamber of Commerce for the emphasis on an employee's "own" sales, given the technological advances that enable a customer to place its own order directly with a supplier, the DOL agreed that a determination of whether an employee is exempt as an outside salesman "should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button." 2004 Final Rule at 22163. But while the Preamble stated that the DOL "agree[d] that technological changes in how orders are taken and processed should not preclude the [outside salesman] exemption for employees who in some sense make the sales," id. at 22162, it emphasized that

> the Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. See 1940 Stein Report at 46 (outside sales exemption does

> not apply to an employee "who does not in some sense make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test.

2004 Final Rule at 22162 (first two emphases ours). The Preamble also elaborated on the primary-duty standard:

> Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale. See 1949 Weiss Report at 83 ("In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt").

2004 Final Rule at 22162-22163 (emphases ours).

We note that the distinction between obtaining commitments to buy and promoting sales by other persons has been respected in areas other than the pharmaceutical industry. See, e.g., Gregory v. First Title of America, Inc., 555 F.3d 1300, 1309 (11th Cir. 2009) (employee who obtained commitments to buy her employer's title insurance service and was credited with those sales, and all of whose efforts

were directed towards the consummation of her own sales and not towards stimulating sales for the employer in general, was an outside sales employee within the meaning of the FLSA and the regulations); Clements v. Serco, Inc., 530 F.3d 1224, 1228 (10th Cir. 2008) (civilian military recruiters who did not obtain commitments from recruits were not outside salesmen within the meaning of, e.g., 29 C.F.R. § 541.504); Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249, 253, 260 (5th Cir. 1969) ("student salesmen" were not outside sales employees where their promotional activities were incidental to sales made by others) .

We think it clear that the above regulations, defining the term "sale" as involving a transfer of title, and defining and delimiting the term "outside salesman" in connection with an employee's efforts to promote the employer's products, do far more than merely parrot the language of the FLSA. The Secretary's interpretations of her regulations are thus entitled to "controlling" deference unless those interpretations are "'plainly erroneous or inconsistent with the regulation." Auer, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (other internal quotation marks omitted)).

We find no such inconsistency and see no such error. Although Novartis contends that the position taken by the Secretary as amicus on this appeal is contrary to the regulations, we disagree. The basic premise of the regulations explaining who may properly be considered an exempt "outside salesman" --a term for which the FLSA explicitly relies on the Secretary to promulgate defining and delimiting

regulations--is that an employee is not an outside salesman unless he does "in some sense make the sales," 2004 Final Rule at 22162. And although that phrase (on which Novartis relies heavily (see, e.g., Novartis brief on appeal at 12, 22, 25, 29)) does not appear in any of the regulations that explicate the term "outside salesman," the regulations quoted above make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale. The position taken by the Secretary on this appeal is that when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy if the physician--who cannot lawfully give a binding commitment to do so--prescribes it, the employee does not in any sense make the sale. Thus, the interpretation of the regulations given by the Secretary in her position as amicus on this appeal is entirely consistent with the regulations.

Nor can we conclude that the regulations constitute an erroneous interpretation of the FLSA definition of "sale" to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," 29 U.S.C. § 203(k). Although the phrase "other disposition" is a catch-all that could have an expansive connotation, we see no error in the regulations' requirement that any such "other disposition" be "in some sense a sale." Such an ejusdem generis-type interpretation is consistent with the interpretive canon that exemptions to remedial statutes such as the FLSA are to be read narrowly, see Arnold, 361 U.S. at 392; see generally A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493

(1945), and is neither erroneous nor unreasonable, see, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) We accordingly owe the Secretary's interpretation deference, and we turn to the question of its applicability to the present cases.

There is no genuine dispute over the sales path generally traversed by Novartis pharmaceuticals. As described in Part I.A. above, Novartis sells its drugs to wholesalers; the wholesalers then sell them to pharmacies; and the pharmacies ultimately sell the drugs to patients who have prescriptions for them. The Reps promote the drugs to the physicians; the Reps do not speak to the wholesalers or to the pharmacies or to the patients.

Nor is there any dispute as to what occurs during the Reps' "sales" calls on physicians. The meetings are brief--generally less than five minutes--and the physicians neither buy pharmaceuticals from the Reps nor commit to buying anything from the Reps or from Novartis. The Reps may give physicians free samples, but the Reps cannot transfer ownership of any quantity of the drug in exchange for anything of value. The physician is of course an essential step in the path that leads to the ultimate sale of a Novartis product to an end user; a patient cannot purchase the product from a pharmacy without a prescription, and it is the physician who must be persuaded that a particular Novartis drug may appropriately be prescribed for a particular patient. But it is reasonable to view what occurs between the physicians and the Reps as less than a "sale."

Novartis suggests that "sale" should be read broadly in light of the statement in the Preamble that "'[e]mployees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale.'" (Novartis brief on appeal at 23 (quoting 2004 Final Rule at 22162) (emphases in brief).) It argues that the Reps "make sales in some sense" because "they are responsible for eliciting commitments from the physicians on whom they call to write prescriptions for NPC drugs and that these prescriptions are, in essence, orders for NPC drugs to be used by the patients in purchasing the drugs from pharmacies." (Novartis brief on appeal at 25-26 (emphasis in original) (internal quotation marks omitted).) Novartis's emphatic reliance on the word "commitments," however, does not lead to a conclusion that the Reps make sales, for it ignores the nature of the "commitment" expressly envisioned by the Secretary in enacting the regulations: "a commitment to buy," 2004 Final Rule at 22162, 22163 (emphasis added). The type of "commitment" the Reps seek and sometimes receive from physicians is not a commitment "to buy" and is not even a binding commitment to prescribe. As the district court noted, "physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that they cannot make a binding commitment to a Rep to prescribe" a particular Novartis product. Novartis I, 593 F.Supp.2d at 650 (emphasis added). Thus, although physicians may say that they will prescribe a given Novartis drug for patients with appropriate diagnoses, such an assurance is not a binding commitment, and physicians remain entirely free to

prescribe a competing product made by a company other than Novartis.

In sum, where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

Novartis points out that a number of district courts have held that pharmaceutical sales representatives are exempt from the FLSA overtime pay requirements as outside salesmen (and/or administrative employees). Those cases are, of course, not binding on us, and their reasoning does not persuade us that the Secretary's interpretations of the regulations should be disregarded. To the extent that the pharmaceuticals industry wishes to have the concept of "sales" expanded to include the promotional activities at issue here, it should direct its efforts to Congress, not the courts. Given the existing statute and regulations, we conclude that the district court should have ruled that the Reps are not outside salesmen within the meaning of the FLSA and the regulations.

C. The "Administrative" Employee Exemption

The Secretary's regulations interpreting the FLSA exemption for "any employee employed in a

bona fide . . . administrative . . . capacity," 29 U.S.C. § 213(a)(1), establish three criteria that must be met for an employee to fit within that category. To be such an "administrative" employee, (1) the employee must earn at least $455 a week, (2) his "primary duty" must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers," and (3) his "primary duty" must "include[] the exercise of discretion and independent judgment with respect to matters of significance," 29 C.F.R. § 541.200(a); see, e.g., id. § 541.201 (elaborating on the second criterion); id. § 541.202 (elaborating on the third criterion). For purposes of this appeal, the relevant issue is whether Novartis has adduced sufficient evidence to permit a rational juror to infer that the Reps meet the third criterion.

With respect to the requirement that the employee's primary duty include "the exercise of discretion and independent judgment with respect to matters of significance," the regulations provide, in relevant part, as follows:

> In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the

> company in handling complaints, arbitrating disputes or resolving grievances.
>
> . . . .
>
> (e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. . . .

Id. § 541.202(a), (b), and (e).

On appeal, the Reps contend that they do "low-level, discretionless marketing work, strictly controlled by Novartis," and that their duties and authority do not satisfy the requirements for applicability of the administrative employee exemption. (Plaintiffs' brief on appeal at 40.) Novartis, in contending that the Reps exercise discretion and independent judgment, argues that the Reps, for example, "must determine how best to develop a rapport with a physician and develop strategies to engage physicians in an interactive dialogue to draw out their patient concerns, treatment styles and predilections"; must "be able to react to expressed physician concerns by emphasizing particular clinical findings regarding the efficacy and safety of NPC's drugs for specific patient types"; "must determine when and how to deliver the [Novartis-determined core] message, taking into consideration," e.g., "the prior call history with each physician, the physician's time constraints, expressed concerns, prescription-writing tendencies and patient population"; and must "determine how best to close each call by evaluating

whether sufficient groundwork has been laid to seek the physician's commitment on that call to write prescriptions." (Novartis brief on appeal at 50-51.)

The Secretary points out that the regulations make clear that the requirement for authority to "exercise . . . discretion and independent judgment" means more than simply the need to use skill in applying well-established techniques or procedures prescribed by the employer, see 29 C.F.R. § 541.202 (e). The Secretary takes the position that for the administrative exemption to apply to the Reps, the regulations require a showing of a greater degree of discretion, and more authority to use independent judgment in matters of significance, than Novartis allows the Reps. Again we find it appropriate to defer to the Secretary's interpretation.

Comparing the record as to the Reps' primary duties against the illustrative factors set out in § 541.202 (b), for example, we see no evidence in the record that the Reps have any authority to formulate, affect, interpret, or implement Novartis's management policies or its operating practices, or that they are involved in planning Novartis's long-term or short-term business objectives, or that they carry out major assignments in conducting the operations of Novartis's business, or that they have any authority to commit Novartis in matters that have significant financial impact. Although Novartis argues that the Reps do commit Novartis financially when they enter into contracts with hotels, restaurants, and other venues for promotional events, "which may cost NPC thousands of dollars" (Novartis brief on appeal at 3-4), the record reveals that the Reps have been given budgets for such

events by the Novartis managers and that the Reps have no discretion to exceed those budgets. Nor have we been pointed to any evidence that the Reps have authority to negotiate and bind Novartis on any significant matters, or have authority to waive or deviate from Novartis's established policies and procedures without its prior approval. What Novartis characterizes as the Reps' exercise of discretion and independent judgment--ability to answer questions about the product, ability to develop a rapport with a physician who has a certain social style, ability to remember past conversations with a given physician, ability to recognize when a message has been persuasive--are skills gained and/or honed in their Novartis training sessions. As described in Part I.A. above, these skills are exercised within severe limits imposed by Novartis. Thus, it is undisputed that the Reps, inter alia,

- have no role in planning Novartis's marketing strategy;

- have no role in formulating the "core messages" they deliver to physicians;

- are required to visit a given physician a certain number of times per trimester as established by Novartis;

- are required to promote a given drug a certain number of times per trimester as established by Novartis;

- are required to hold at least the number of promotional events ordered by Novartis;

- are not allowed to deviate from the promotional "core messages";

- and are forbidden to answer any question for which they have not been scripted.

Novartis argues that the Reps exercise a great deal of discretion because they are free to decide in what order to visit physicians' offices, free to decide how best to gain access to those offices, free to decide how to allocate their Novartis budgets for promotional events, and free to determine how to allocate their samples. (See Novartis brief on appeal at 51.) In light of the above controls to which Novartis subjects the Reps, we agree with the Secretary that the four freedoms advanced by Novartis do not show that the Reps are sufficiently allowed to exercise either discretion or independent judgment in the performance of their primary duties. Accordingly, we conclude that the district court should have ruled that the Reps are not bona fide administrative employees within the meaning of the FLSA and the regulations.

State Law

The district court concluded that the overtime wage requirements of New York law and California law are not meaningfully different from the requirements of the FLSA, see Novartis I, 593 F. Supp. 2d at 654, 658, and no party has argued on this appeal that the requirements differ. Accordingly, we also vacate the district court's rulings that the Reps fall within the exemptions provided by state law.

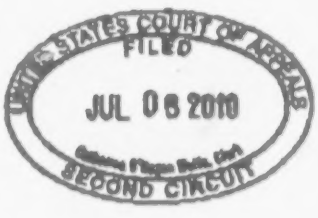
CONCLUSION

We have considered all of Novartis's arguments in support of the judgment and have found in them no merit. We vacate the judgment of the district court and remand for further proceedings not inconsistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of July, two thousand and ten.

BEFORE: AMALYA L. KEARSE,
PETER W. HALL,
Circuit Judges,
JED S. RAKOFF,
District Judge.*



In Re NOVARTIS WAGE AND HOUR LITIGATION

JUDGMENT
Docket No.
09-0437-cv

The appeal in the above-captioned case from the United States District Court for the Southern District of New York was argued on the District Court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is VACATED and the case is REMANDED for further

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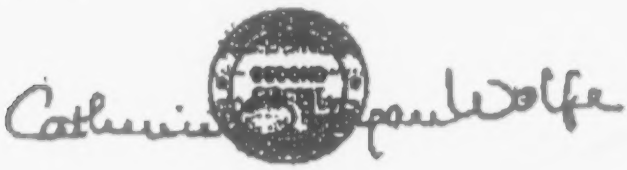
* The Honorable Jed S. Rakoff of the United States District Court for the Southern District of New York, sitting by designation.

proceedings in accordance with the opinion of this Court.

FOR THE COURT,
Catherine O'Hagan Wolfe,
Clerk



Joy Fallek, Administrative Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In Re Novartis Wage and Hour Litigation	06-MD-1794 (PAC) OPINION & ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

This consolidated class action lawsuit[1] raises the question of whether individuals employed as Pharmaceutical Sales Representatives ("Reps") are entitled to overtime pay under the federal Fair Labor Standards Act (the "FLSA" or "Act"), 29 U.S.C. §§ 201 et seq., and corresponding state wage and hour laws. Plaintiffs in this action are current and former Reps employed by Defendant Novartis Pharmaceuticals Corporation ("NPC") in New York, California, and other states.[2] They claim they qualify

[1] The present action consolidates two cases. Lopes v. Novartis Corporation et al., No. 06-Civ.-2268, was filed in this District on March 23, 2006. On October 31, 2006, the Judicial Panel on Multidistrict Litigation transferred the second case, White v. Novartis Pharmaceutical Corporation, No. 06-Civ.-11475, from the Central District of California and consolidated it with Lopes for the purpose of pre-trial proceedings.

[2] The Plaintiff class is subdivided into three groups: (1) employees who worked as Reps outside of New York and California between March 23, 2003 and April 7, 2007 and submitted a consent-to-join form; (2) employees who worked as Reps in California between March 23, 2002 and April 7, 2007

for overtime pay, and seek unpaid overtime wages, under the FLSA, as well as under the corresponding laws of New York and California.

NPC contends that Plaintiffs are not entitled to overtime pay because they fall within the "outside sales" and "administrative" exemptions to both the federal and state overtime requirements. NPC also argues that certain members of the Plaintiff class are exempt from the FLSA's overtime requirement because they qualify as "highly compensated" employees.

Both parties have moved for summary judgment, and both claim there are no genuine issues of material fact. Having reviewed the extensive record and heard oral argument from the parties, the Court agrees there are no factual issues, and that judgment as a matter of law is appropriate. Plaintiff Reps are not entitled to overtime compensation because they are exempt from coverage as outside salespersons under the FLSA and state laws, and even if they are not outside salespersons, they are administrative employees and are still exempt. NPC's motion for summary judgment is therefore GRANTED and Plaintiff's motion for summary judgment is DENIED.

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and did not opt out of the class; and (3) employees who worked as Reps in New York between March 23, 2000 and April 7, 2007 and did not opt out of the class. (See Order Certifying Fair Labor Standards Act Collective Action, Rule 23 Class Actions and Approving Notice (Docket #19, Feb. 15, 2007).)

BACKGROUND

I. Facts

Although the parties draw different legal conclusions from the factual record, the material facts themselves are straightforward and essentially undisputed.[3] NPC researches, develops, manufactures, markets, and sells pharmaceutical drugs. It is one of the largest drug manufacturers in the United States, with approximately 13,000 employees nationwide.

More than 6,000 of these employees are Pharmaceutical Sales Representatives. In 2005, Reps earned an average salary of $91,500—meaning that, for the year, NPC spent a total of roughly half a billion dollars on Reps' salaries. Some Reps earn in excess of $100,000 per year. NPC advertises its Rep positions as sales positions, and seeks to fill them with college graduates who are self-motivated, can work independently, and demonstrate good communication and interpersonal skills. When hired, Reps are told that they are a part of NPC's sales force and that they will be engaged in selling NPC products. Because new Reps often lack pharmaceutical backgrounds, NPC provides them with basic training in anatomy, physiology, pharmacology, and other subjects. New Reps are also trained in sales techniques before being sent out into

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[3] The facts presented herein are derived from the parties' motions for summary judgment; their statements of fact submitted pursuant to Local Rule 56.1; and the transcript of the oral argument before this Court on November 18, 2008.

the field. NPC supplements this initial training with continuing education sessions during the course of the Reps' employment.

The primary function of the Reps is calling on physicians and giving them information about NPC's drugs. Each Rep is assigned to a geographic territory and provided with a target list of physicians. Reps are further divided into three categories: "Mass Market" Reps call on general practice physicians; "Specialty" Reps call on specialists such as cardiologists or neurologists; and "Hospital" Reps call on major medical centers and teaching hospital personnel. Reps are assigned certain NPC drugs depending upon the type of physicians on their target list—for example, a Specialty Rep responsible for visiting a number of cardiologists would be assigned NPC drugs that are appropriate for a cardiologist to prescribe. Indeed, the goal of the Reps' visits is to educate the physicians about NPC drugs so that the physicians may write prescriptions for those drugs where doing so would be appropriate for the physicians' patients.

Since the Reps are advocating products which are routinely and closely regulated by the Food and Drug Administration (FDA), NPC prepares scripts and related materials which the Reps are expected to use to deliver a "core message" about NPC products to each physician they visit. Reps may not go beyond the boundaries of the messages crafted by NPC. For example, Reps may not make claims about the effectiveness of NPC's products, nor can they comment adversely on a competitor's product, unless these claims have been cleared by NPC. NPC also controls the methods by which Reps may convey

their message. NPC provides Reps with drug samples, pamphlets, clinical studies, visual aids, and other materials, and gives instructions on how these materials should be used during the Reps' presentations.

While NPC provides Reps with core messages and supporting materials, Reps have discretion as to when and how they deploy them. Reps plan their daily call schedules and decide when to visit each doctor on their target list. Within the parameters set by NPC, Reps are expected to tailor their presentations to each individual physician based upon such variables as the amount of time the physician allocates to meeting with the Rep; the physician's patient base and prescribing habits; and the Rep's assessment of the physician's personality. In addition, NPC provides Reps with budgets that they are expected to use to organize "lunch-and-learn" presentations and other informational events for the physicians on their list. Reps select the speakers and invitees for these informational events following guidelines set by NPC.

Under applicable FDA regulations, Reps are barred from selling NPC drugs directly to physicians. Instead, Reps focus on persuading physicians to write prescriptions that are ultimately used by patients in order to obtain NPC products from a pharmacy. Reps are expected to end each physician visit with a "close." Ideally, a Rep closes a visit by asking the physician for a non-binding commitment to prescribe NPC drugs where doing so is appropriate for a patient. At other times, a Rep might close by asking the physician to review a clinical study supporting the use of an NPC product

or even simply thanking the physician for his or her time.

In addition to base pay, Reps receive "incentive payments." These incentive payments are tied to the number of prescriptions written by physicians within the Reps' territory for drugs to which the Reps is assigned. Plaintiffs concede that between 15% and 25% of a Rep's average annual salary of $91,500 consists of incentive pay. Payments of between $13,725 and $22,875 are significant components of a Rep's annual salary. Additionally, NPC provides Reps with company cars and fuel costs to facilitate their physician visits. High-performing Reps are eligible for additional benefits such as all-expenses-paid vacations.

Reps do not work out of NPC's offices. They work from their homes, and spend most of their day traveling, in their company-provided vehicles, from physician to physician. Once every four to six weeks, their managers accompany them on their calls in what is known as a "ride-along." Aside from these ride-alongs, Reps are generally on their own, subject to such supervision as can be gained by cell phone and e-mail communications with supervisors. Although NPC expects Reps to be in the field making calls from 8 a.m. to 5 p.m. each weekday, and expects Reps to call on a certain number of physicians each day, Reps are ultimately responsible for organizing their daily activities.

At all times relevant to the present action, NPC classified its Reps as exempt from the FLSA's overtime requirement. Plaintiffs have no complaint about their salary, which is well in excess of the

statutory minimum. Instead, Plaintiffs contend they should be compensated at time-and-a-half for hours worked in excess of 40 hours per week.

II. The Fair Labor Standards Act (FLSA) and Corresponding State Laws

A. The FLSA

The FLSA was enacted 70 years ago, in 1938, to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). To that end, the FLSA imposes various wage and hour requirements, including the overtime requirement at issue in the present case. Section 207(a)(1) of the Act provides that "no employer shall employ any of his employees...for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Id. § 207(a)(1).

Section 213(a)(1) establishes the so-called "white collar" exemptions to the overtime requirement, including the outside sales and administrative exemptions. See id. § 213(a)(1). In 2004, the Department of Labor ("DOL")[4] explained the rationale behind these exemptions:

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[4] The FLSA grants the Secretary of Labor broad authority to "define[] and delimit[]" the exemptions to the overtime requirement "from time to time by regulations." 29 U.S.C. §

> The legislative history [of the FLSA] indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium.

Dep't of Labor, Wage and Hour Division, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule ("DOL 2004 Final Rule"), 69 Fed. Reg. 22122, 22123-24 (Apr. 23, 2004).

213(a)(1). The DOL's regulations therefore "have the force of law...and are to be given controlling weight unless they are found to be arbitrary, capricious, or manifestly contrary to the statute." Freeman v. Nat'l Broad. Co., Inc., 80 F.3d 78, 82 (2d Cir. 1996). The DOL also issues interpretive regulations setting forth the Secretary's official position on how the regulations should be applied. These interpretations do not have the force of law, but they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Due to the remedial nature of the FLSA's overtime requirement, however, exemptions should be "narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." Bilyou v. Dutchess Beer Distribs., Inc., 300 F.3d 217, 222 (2d Cir. 2002) (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)). An employer who invokes an exemption bears the burden of proving that its employees are exempt. See Bilyou, 300 F.3d at 222.

1. The Outside Sales Exemption

FLSA section 213(a)(1) exempts from overtime compensation "any employee employed...in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). An outside salesperson is defined as any employee:

> (1) Whose primary duty is:
>
> > (i) making sales within the meaning of Section 3(k) of the Act; or
> >
> > (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a).

The terms "sale" and "sell" include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The DOL has further indicated that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). In the 1940 "Stein Report," the DOL stated that it would be improper to extend the outside sales exemption to "anyone who does not in some sense make a sale." Dep't of Labor, Wage and Hour and Public Contracts Divisions, Report and Recommendations of the Presiding Officer (Harold Stein) on Proposed Revisions of Regulations (Oct. 10, 1940) ("Stein Report") at 46; see also DOL 2004 Final Rule, 69 Fed. Reg. at 22162 ("An employer cannot [apply the outside sales exemption] unless it demonstrates that the employee, in some sense, has made sales.").

An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). A determination of an employee's primary duty "must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole." Id. For the purposes of determining whether an employee falls within the outside sales exemption, all work that is "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or "that furthers the employee's sales efforts" must be counted as exempt outside sales work. Id. § 541.500(b). In other words, once it has been determined that an employee makes sales, all work done by that employee incidental to those

sales must be taken into account when determining whether sales work constitutes the employee's primary duty.

The DOL's regulations draw a distinction between exempt and non-exempt promotional work. "Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." Id. § 541.503(a). The DOL gives an example of promotional work incidental to sales made by others: a manufacturer's representative who visits a customer's shop for the purposes of "putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise." Id. § 541.503(b). Further, in a 1999 Opinion Letter, the DOL determined that college recruitment counselors were not exempt outside salespersons because they were "not engaged in making sales of the college's services, or obtaining contracts for its services." Opinion Letter No. 2138 [1999-02 Wages-Hours] Lab. L. Rep. (CCH) ¶ 33030 (Apr. 20, 1999). Instead, the counselors engaged in non-exempt promotional work by "identifying qualified customers, i.e. students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant." Id.

2. The Administrative Exemption

The FLSA also exempts "any employee employed in a bona fide...administrative ...capacity" from the

overtime requirement. 29 U.S.C. § 213(a)(1). The DOL defines an administrative employee as one who earns more than $455 per week and whose primary duties include: (1) "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers" and (2) "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a). Application of the administrative exemption therefore involves a "two-part inquiry" which takes into account both the "type of work" the employee performs and the "level or nature" of that work. DOL 2004 Final Rule, 69 Fed. Reg. at 22144.

a. Office or non-manual work directly related to management or general business operations

In order to meet the first requirement, "an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment." 29 C.F.R. § 541.201(a). Administrative work is therefore distinct from production work, although the DOL has cautioned that the administrative/production distinction is but "one analytical tool" for determining whether the exemption applies, and that it is only outcome determinative where the employee's work "falls squarely on the production side of the line." DOL 2004 Final Rule, 69 Fed. Reg. at 22141.

Exempt administrative work includes "advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control. Much of this work, but not all, will relate directly to management policies." Id. at 22138. The administrative exemption also covers "a wide variety of persons who either carry out major assignments in conducting the operations of the business, or whose work affects business operations to a substantial degree, even though their assignments are tasks related to the operation of a particular segment of the business." Id. The DOL has stated that work related directly to management or general business operations:

> includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities.

29 C.F.R. § 541.201(b).

b. Discretion and independent judgment with respect to matters of significance

The DOL defines "the exercise of discretion and independent judgment" as "the comparison and the

evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." Id. § 541.202(a). In determining whether an employee meets this requirement, the DOL has provided an extensive, though not exhaustive, list of "[f]actors to consider":

> whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

Id. § 541.202(b). "Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment...." DOL 2004 Final Rule, 69 Fed. Reg. at 22143.

The DOL has cautioned that the mere "use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources" falls short of discretion and independent judgment. 29 C.F.R. § 541.202(e). Instead, an employee must "ha[ve] the authority to make an independent choice, free from immediate direction or supervision" in order to be exempt. Id. § 541.202(c). The employee need not, however, be the final decision-maker. To the contrary, "[t]he fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment." Id. § 541.202(c).

Depending upon the nature of the employer's business, a large number of employees may satisfy the second requirement of the administrative exemption. "The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance." Id. § 541.202(d).

3. The Highly Compensated Employee Exemption

In August 2004, the DOL created an exemption to the overtime requirement for highly compensated employees, defined as employees who: (1) receive total annual compensation of at least $100,000 (including commissions and other non-discretionary compensation) and a weekly salary of at least $455 per week, and (2) "customarily and regularly perform[] any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee." Id. § 541.601(a)-(b)(1). Employees "customarily and regularly" perform a duty if they perform it more than occasionally but less than constantly. Id. § 541.701. In other words, employees who earn at least $100,000 are exempt from the FLSA's overtime requirement if they perform at least one exempt administrative duty with some degree of regularity.

B. New York and California Overtime Laws

Under New York law, as under the FLSA, employees are entitled to overtime pay for every hour they work beyond 40 in a week. New York law also exempts employees who qualify as outside salespersons or administrative employees from the overtime requirement, and it defines and applies these exemptions in the same manner as the FLSA. See 12 N.Y.C.R.R. § 142-2.14(5); Galasso v. Eisman,

Zucker, Klein & Ruttenberg, 310 F. Supp. 2d 569, 575 (S.D.N.Y. 2004).[5]

California's wage and hour laws are essentially the same as the FLSA and New York law: employees are entitled to overtime for each hour worked above 40 in a week, provided they do not fall within certain exemptions. California law also exempts employees who qualify as outside salespersons or administrative employees—but the ways in which these exemptions are defined differs slightly. In order to qualify as an outside salesperson, sales activities must account for "more than half' of the employee's working time. Cal. Code Regs. Tit. 8, § 11070(2)(J). This "quantitative" test differs slightly from the "primary duty" test contained in the FLSA. Similarly, California's administrative exemption requires that an employee be "primarily engaged" in administrative tasks rather than having those tasks as his or her "primary duty," but otherwise it mirrors the federal exemption. Id. § 11070(1)(A)(2)(f).

Neither New York nor California law contains an analog to the FLSA's exemption for highly compensated employees.

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[5] The parties agree that there is no difference between the relevant provisions of the FLSA and New York law. (See Pl. Mem. in Support of Summ. Judg. ("Pl. Mem.") at 19-20; Def.'s Mem. in Support of Summ. Judg. ("Def. Mem.") at 9 fn.6.) Consequently, in the discussion that follows, the Court will analyze the applicability of the FLSA and New York exemptions together. See infra Parts IV.A and V.A.

DISCUSSION

III. Summary Judgment Standard of Review

Summary judgment is appropriate where the record demonstrates that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it "might affect the outcome of the suit under governing law...." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The moving party bears the initial burden of producing evidence on each material element of its claim or defense demonstrating that it is entitled to relief. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The evidence on each material element must be sufficient to entitle the movant to relief as a matter of law. Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2d Cir. 2004).

Once the moving party has made an initial showing that no genuine issue of material fact remains, the nonmoving party may not refute this showing solely by means of "[c]onclusory allegations, conjecture, and speculation," Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003) (internal citations and quotations omitted), but must instead present specific evidence in support of its contention that there is a genuine dispute as to material facts. Fed. R. Civ. P. 56(e). The Court resolves all ambiguities and draws all factual inferences in favor of the nonmovant, but "only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 127 S.Ct. 1769, 1776 (2007) (citing Fed. R. Civ. P. 56(c)).

The same standard of review applies when the court is faced with cross-motions for summary judgment. Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001). Each party's motion must be reviewed on its own merits, and the Court must draw all reasonable inferences against the party whose motion is under consideration. Id.

IV. The Outside Sales Exemption

A. The FLSA and New York Law

In their motion for summary judgment, Plaintiffs argue that they do not fall within the outside sales exemption because they:

> fail to meet the essential prerequisite of the outside sales exemption: making sales. NPC Reps do not sell drugs to the doctors they visit. With physicians, Reps do not exchange any good or service, contract to sell any good or service, consign for sale any good or service, or obtain orders or contracts for the use of facilities. No money or title to drugs ever changes hands between Reps and doctors. Indeed, it is illegal for Reps to sell pharmaceuticals, and such a sale is cause for dismissal.

(Pls.' Mem. in Support of Summ. Judg. ("Pl. Mem.") at 3.) In other words, Plaintiffs claim they are not exempt because they do not execute sales within the plain meaning of the FLSA and the DOL regulations. (Pls.' Opp. to Def.'s Motion for Summ. Judg. ("Pl. Opp.") at 17 (citing Amendola v. Bristol-Myers Squibb Co., 558 F. Supp. 2d 459, 470 (S.D.N.Y.

2008).) Instead, Plaintiffs categorize their activities as mere "promotion," and therefore argue that they are entitled to overtime pay. (See id. at 22.)

Defendant NPC, in its motion for summary judgment, claims that Reps fall within the "long-standing judicial and common sense understandings of the 'outside sales' exemption." (Def.'s Mem. in Support of Summ. Judg. ("Def. Mem.") at 9.) It urges the Court to focus on the purpose of the exemption and the practicalities of the pharmaceutical industry in determining whether Reps are exempt. (Id. at 10.) Defendant argues that the prescriptions which Reps seek to elicit from the physicians they visit "are, in essence, orders for NPC drugs to be used by the patients in purchasing NPC's drugs from pharmacies. Without prescriptions, patients cannot buy the drugs and there is no sale...." (Id. at 15.) Moreover, Reps do not engage in non-exempt promotional work because they make solicitations for themselves rather than others—their compensation depends, in substantial measure, upon the prescriptions they generate. (Id. at 11-12.)

This Court must construe the outside sales exemption narrowly in order to ensure that it is only applied to those employees who fit "plainly and unmistakably within [its] terms and spirit." Bilyou, 300 F.3d at 222. In doing so, however, the Court must not lose sight of the FLSA's practical goals. Adopting Plaintiffs' constricted reading of the FLSA ignores the Act's spirit, purpose, and goals.

One of the earliest and clearest explanations of the rationale behind the outside sales exemption was

provided by the Tenth Circuit in Jewel Tea Co. v. Williams et al., 118 F.2d 202 (10th Cir. 1941):

> The reasons for excluding an outside salesman are fairly apparent. Such salesm[a]n, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Id. at 207-08.

Jewel Tea teaches that outside salespersons are exempt from the overtime requirement not because they "sell," as that term is technically defined, but rather because they (1) generate commissions for themselves through their work and (2) work with minimal supervision, making adherence to an hours-based compensation scheme impractical. The Jewel Tea rationale is echoed in the DOL's 2004 Final Rule, which notes that the "white collar" exemptions owe their existence to the fact that the employees they were meant to cover "typically earned salaries well above the minimum wage, and they were

presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement...." 69 Fed. Reg. at 22124. The DOL Final Rule also recognizes that the work done by these employees "was difficult to standardize to any time frame...making compliance with the overtime provisions difficult...." Id.

Of course, the Court must first determine whether Reps engage in selling. Indeed, the DOL regulations and the case law are clear that the outside sales exemption cannot apply to any employee who does not make sales in some sense. 29 C.F.R. § 541.500; DOL 2004 Final Rule, 69 Fed. Reg. at 22162-63; see also Ackerman v. Coca-Cola Enterprises, Inc., 179 F.3d 1260, 1265 (10th Cir. 1999) (holding that the exemption cannot apply "if the employee in question does not actually consummate the sale....").

"Given the broad scope of the FLSA and its implementing regulations, which reach all employees involved in interstate commerce, see 29 U.S.C. §§ 202(a)-(b), 207(a)(1), the regulations provide only general guidance to accommodate the varying needs of employers and employees in a diverse and varied national economy." Havey v. Homebound Mortgage, Inc., 547 F.3d 158, 163 (2d Cir. 2008) (citation omitted). Recognizing this, courts have taken into account the characteristics of the industry in question when determining the applicability of the outside sales exemption. For example, in Nielsen v. DeVry, Inc., 302 F. Supp. 2d 747 (W.D. Mich. 2003), the court described the nature of plaintiff field representatives' interactions with potential students, as well as the nature of defendant school's

admissions process, before finding that the field representatives fell within the outside sales exemption. Id. at 755-56. Similarly, in Gregory v. First Title of America, Inc., No. 06-Civ.-1746, 2008 WL 150487 (M.D. Fla. Jan. 14, 2008), the court held that plaintiff, whose job was to refer customers to defendant insurance company, "obtained orders" and was therefore covered by the outside sales exemption even though "Plaintiff could not sell title insurance herself because she was not licensed to do so." Id. at *2 (also noting that plaintiff's "compensation was tied to how many orders for service she obtained").

In Medtronic, Inc. v. Gibbons, 527 F. Supp. 1085 (D. Minn. 1981), aff'd 684 F.2d 565 (8th Cir. 1982), a case dealing with a dispute over an employment contract, the district court described the nature of sales in the medical device industry as follows:

> The ultimate consumer[s] of pacemakers are cardiac patients, not hospitals or doctors. But the pacemakers are sold by the manufacturers to the hospital where the patient is being treated. The hospital purchases pacemakers on recommendations from a physician....Medtronic's sales effort focuses on the physicians and medical personnel. Thus, the term "customers" must include not only the hospital, which actually pays for the product, but also the physicians and surgeons who recommend which product to purchase.

Id. at 1094 fn.3.

The Medtronic court's description of sales in the medical device industry is instructive for understanding the nature of the sales made by Reps in the present case. The FDA regulates the pharmaceutical industry in myriad ways, controlling, among other things, how drugs may be researched, manufactured, labeled, sold, distributed, and prescribed. See 21 U.S.C. §§ 351 et seq. Legally, Reps cannot sell NPC drugs directly to physicians. (See Pls.' Rule 56.1 Statement of Undisputed Facts ("PSUF") ¶¶ 107, 109, 110, 112.) Further, physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that they cannot make a binding commitment to a Rep to prescribe certain NPC products. (See Pl. Opp. at 21 fn.13.) Nevertheless, like the physicians who had the authority to recommend the purchase of certain medical devices in Medtronic, the physicians called upon by Reps ultimately control the purchase of NPC products by writing prescriptions. In fact, in the present case, physicians are arguably more integral to sales than their counterparts in Medtronic because, absent a prescription from a doctor, the patient end-users of NPC drugs are not able to obtain those drugs. NPC spends in excess of $500 million annually to have its Reps meet on a frequent and repeat basis with these physicians to seek their commitments to prescribe NPC products. In other words, Reps make sales in the sense that sales are made in the pharmaceutical industry.

Moreover, as the First Circuit recently recognized in IMS Health Inc. v. Ayotte, __ F. 3d __, No. 07-1945, 2008 WL 4911262 (1st Cir. Nov. 18, 2008), Reps are highly effective at making sales. The

IMS Health court used the term "detailing" to refer to the work carried out by pharmaceutical sales representatives, explaining that "[d]etailing is the face-to-face advocacy of a product by sales representatives who visit doctors' offices and hospitals to meet with the prescribing health care professionals....[T]he objective of these visits is to make sales...." 2008 WL 4911262, at *26. "Detailing works: that it succeeds in inducing physicians to prescribe larger quantities of brand-name drugs seems clear....The fact that the pharmaceutical industry spends over $4,000,000,000 annually on detailing bears loud witness to its efficacy." Id. at *12. In recognition of the significant influence of Reps on physicians' prescribing habits—which arguably led physicians to prescribe brand-name pharmaceuticals instead of cheaper generic drugs—the IMS Health court upheld a New Hampshire law that limited Reps' access to physicians' prescribing histories on the grounds that these histories allowed Reps "to target particular physicians and shape their sales pitches accordingly." Id. at *1. The fact that the First Circuit's decision does not address the FLSA is of no consequence: it provides a clear, convincing, and practical discussion of the nature and effect of the Reps' work and, as such, supports the logical conclusion that Reps make sales.

Plaintiffs argue that "[NPC] sells drugs to distributors. Distributors sell drugs to pharmacies. Pharmacies sell drugs to individuals." (Oral Argument Transcript, Nov. 18, 2008 ("OA Tr.") at 5:9-10.) In other words, Plaintiffs ask this Court to conclude that the only true sales made by NPC are to distributors. The Court cannot ignore reality.

Distributors are not the end-users of NPC's products. If physicians did not prescribe NPC products, patients would be unable to buy them and distributors would have no incentive to make purchases from NPC. The purchase cycle commences with a prescription from physicians, who are therefore the appropriate target of the Reps' sales efforts. When the physician writes a prescription for the NPC product, then a sale can take place. "Without prescriptions, patients cannot buy the drugs and there is no sale." (Def. Mem. at 15.)

Plaintiffs' argument that Reps' activities constitute mere "promotional work" is simply wrong. Contrary to Plaintiffs' assertion that "[t]he DOL's current regulations reaffirm [a] promotion versus sales distinction" (Pl. Mem. at 21), the DOL in fact does not draw a distinction between "sales" and "promotion." Rather, the DOL distinguishes between promotional activities that are exempt, because they relate to the employee's own sales, and promotional activities that are non-exempt, because they pave the way for sales made by others. See 29 C.F.R. § 541.503(a) ("Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work."); see also Stein Report at 46 (stating that promotional employees "engaged in paving the way for salesmen" are not exempt); DOL 2004 Final Rule, 69 Fed. Reg. at 22162 (refusing to "[e]xtend[] the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales....").

Here, any promotional work Reps undertake is directed towards the consummation of their own sales, and therefore exempt. The incentive pay structure in the Reps' salaries is also a strong indicator that in some sense they are making a sale. Incentive payments are tied to the number of prescriptions written by physicians on a Rep's target list for drugs to which the Rep is assigned. (See Def. Opp. at 8; OA Tr. at 22:20-25:5.) Undoubtedly the incentives are substantial and average between $13,000 and $23,000 of the average salary of $91,500.

Plaintiffs argue that incentive payments do not necessarily match specific sales to specific Reps. It is uncontested that more than one Rep might visit a particular physician to discuss a particular drug, and factors other than a Rep's presentation might influence a physician's decision to prescribe an NPC product. (See Pl. Opp. at 22.) But there is nothing that requires a one-for-one match. (See, e.g., Prendergast Dep. at 91:12-19.) The incentive structure makes clear that it rewards a Rep's success in persuading physicians to write prescriptions. The more prescriptions written by the physicians covered by the Rep, the greater the incentive pay the Rep receives. As Defendant recognizes: "NPC's Sales Reps seek commitments for their 'own' account in the only practical sense that matters, namely that they receive incentive pay (and are evaluated) for prescriptions written by the physicians on whom they call." (Def. Opp. at 8.) The Reps themselves recognize this as well: in their yearly self-evaluations, they often emphasize their role in increasing market share for their assigned drugs by

persuading certain physicians to write prescriptions for those drugs. (See, e.g., Tobertga Dep. Ex. 3; Lopes Dep. Ex. 8.)[6] Reps therefore "'obtain a commitment to buy' from the customer and are credited with the sale." DOL 2004 Final Rule, 69 Fed. Reg. at 22162.

Given the FDA's regimen controlling how drugs are sold and delivered to patients, it is clear that Reps do not pave the way for sales that will be made by others. In Wirtz v. Keystone Readers Service, Inc., 418 F.2d 249 (5th Cir. 1969), the court was faced with a classic example of non-exempt promotional activity. Plaintiff employees promoted magazine subscriptions by going door-to-door and persuading customers to fill out a non-binding order card. Id. at

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[6] Just as Plaintiffs mischaracterize themselves as "robots" and "automatons" in an attempt to avoid a finding that they have discretion and exercise independent judgment (see infra Part V.A.2), here they argue that Reps are less than truthful in filling out their annual evaluation forms which describe their efforts to improve sales. Plaintiffs contend that their self-evaluations cannot be relied upon because "Reps exaggerate their efforts on calls and try to match NPC's proffered language regarding the criteria on which they are to be judged." (Pls.' Response to Def.'s Statement of Undisputed Facts ("Pls.' Response to DSUF") at 37.) NPC, however, is not evaluating its employees and compensating them up to 25% of their base salary based on so-called "exaggerations." Even if Reps make use of NPC "buzzwords," their yearly evaluations are realistic and known to involve a substantial part of their compensation. In her 2004 evaluation, for example, Plaintiff Simona Lopes identifies four specific doctors with whom she increased market share for the NPC drug Lotrel by specific percentages. (Lopes Dep. Ex. 8 at NPCXW&H120.) In that same review, her manager cited to her success with these doctors as evidence of her ability to "improv[e] Lotrel share in difficult to see customers...." (Id. Ex. 8 at NPCXW&H127.)

252. Later, "student managers" would call on the potential customers identified by the order cards and attempt to persuade the customers to enter into binding sales orders for more expensive items. Id. The situation in the present case is clearly different because there is no equivalent of the "student managers," i.e. there are no other NPC employees who consummate sales whose foundations were laid by the Reps. Reps are the only NPC employees who meet with physicians in an attempt to persuade them to write prescriptions. Nor is it a one-time event. The whole premise of assigned territories, with assigned physicians and frequent and repeated calls over time, is to build up a relationship so that with each call the physician is convinced that he or she will be treating patients appropriately by prescribing NPC products. To the extent these physicians write prescriptions for NPC drugs, it is the Reps—and not other NPC employees—who obtain these prescriptions and who receive credit for them by means of incentive payments.

Reps also enjoy the independence traditionally associated with outside salespersons. They work outside of NPC's offices and they have the ability, within certain reasonable limits, to set the schedule for their workday. Aside from the occasional "ride-along" with a manager (once every four to six weeks, i.e. 8-12 days in a year with over 200 work days), they are not subject to direct supervision. While NPC asserts that Reps work out of their homes, Plaintiffs vigorously argue they do not. (See Pls.' Response to DSUF at 2-3.) Plaintiffs are off on an unrelated tangent. The appropriate standard is whether the employee works away from his employer's place of

business. Reps clearly work outside of NPC's offices and therefore satisfy this requirement.

Plaintiffs further contend that, because of modern technology, Reps no longer enjoy "the degree of autonomy traditionally associated with outside salespersons" such as the salespersons in Jewel Tea. (Pl. Opp. at 23.) This argument is unconvincing. The salespersons in Jewel Tea were expected to report for work at 7 a.m. each day, were required to perform certain clerical tasks, kept logs of their work in "route books" that were subject to review by supervisors, and interacted with stock managers in order to obtain the items they sold. 118 F.2d at 204-05. Today's technology, such as cell phones and e-mail, may be quicker, but its function is still the same. Reps are not punching a clock and a manager is not looking over their shoulders. The autonomy they enjoy makes it more difficult to tie them to an hours-based compensation scheme—which is one of the factors the outside sales exemption is designed to take into account. See DOL 2004 Final Rule, 69 Fed. Reg. at 22124.

While courts have narrowly applied the outside sales exemption, see Ruggeri v. Boehringer Ingelheim Pharms., Inc., __ F. Supp. 2d __, No. 06-Civ.-1085, 2008 WL 4917850, at *3 (D. Conn. Nov. 17, 2008), recognizing the realities of the pharmaceutical industry is not incompatible with engaging in a narrow reading. To the contrary, it produces results that reflect the exemption's terms and spirit. Reps make sales by obtaining commitments to prescribe NPC drugs from physicians. They are credited with those sales and compensated accordingly by means of incentive

payments. They also work free of direct supervision. As such, under both the FLSA and New York law, they qualify as exempt outside salespersons.

B. California Law

Under California law, an outside salesperson is defined as "any person, 18 years of age or over, who customarily and regularly works more than half the working time away from the employer's place of business selling tangible or intangible items or obtaining orders or contracts for products, services or use of facilities." Cal. Code Regs. tit. 8, § 11070(2)(J). Thus, unlike the FLSA, which looks to the employee's "primary duty" to determine whether the outside sales exemption applies, 29 C.F.R. § 541.500(a)(1), the California exemption is "purely quantitative...focusing exclusively on whether the individual works more than half the working time selling or obtaining orders for contracts." Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 797 (1999) (internal quotation marks omitted).

Three recent decisions by federal courts in the Central District of California have held that pharmaceutical sales representatives qualify as exempt outside salespersons under California law. See Menes v. Roche Labs., Inc., No. 07-Civ.-1444, 2008 U.S. Dist. LEXIS 4230 (C.D. Cal. Jan. 7, 2008); Barnick v. Wyeth, 522 F. Supp. 2d 1257 (C.D. Cal. 2007); D'Este v. Bayer Corp.. No. 07-Civ.3206, 2007 U.S. Dist. LEXIS 87229 (C.D. Cal. Oct. 9, 2007). The California federal courts reached their decisions by (1) determining that interpretations of the FLSA have persuasive authority for interpreting California's wage and hour laws; and (2) employing

an "indicia of sales" analysis similar to the one employed in Nielsen, 302 F. Supp. 2d at 756-58, in order to conclude that pharmaceutical sales representatives qualified as outside salespersons under California law. See Barnick, 522 F. Supp. 2d at 1262; Menes, 2008 U.S. Dist. LEXIS 4230, at *4-*5; D'Este, 2007 U.S. Dist. LEXIS 87229, at *14 fn.2, *16.

Plaintiffs in the present matter argue that the recent California decisions were erroneously decided because they "are at war with the doctrine established by [Ramirez v. Yosemite Water Co.] that California's outside sales exemption is narrower and more favorable to employees than the FLSA's version." (Pl. Mem. at 26.)

Plaintiffs overstate the extent to which California's outside sales exemption offers greater protection to employees. Ramirez involved a plaintiff who carried out a dual function for his defendant employer—he acted as a deliveryman but he also made sales. 20 Cal. 4th at 790-94. Both the trial and appellate courts concluded that the plaintiff qualified as an outside salesperson because his "prime function" was making sales. Id. at 794. The California Supreme Court reversed and remanded the case for a determination as to whether the plaintiff spent "more than half' of his time engaged in sales work, as required by California's version of the outside sales exemption. Id. at 802-03. Thus, when Ramirez states that "[b]y choosing not to track the language of the federal exemption and instead adopting its own distinct definition of 'outside salespersons,' the [California Industrial Welfare Commission] evidently intended to depart from

federal law and to provide, at least in some cases, greater protection for employees," it is referring only to the greater protection afforded by California's quantitative test (under which a dual-function employee such as the plaintiff in Ramirez was likely non-exempt) in comparison to the FLSA's primary duty test (under which the plaintiff was likely exempt). Id. at 797.

The primary duty/quantitative distinction has no bearing on the present case because Reps do not serve a dual function—their function is to call on physicians in order to persuade them to write prescriptions for NPC's drugs. Thus, the only remaining question is whether the Reps function as salespersons. For all the reasons discussed above, see supra Part IV.A, the answer to that question is yes: within the parameters of the pharmaceutical industry, Reps make sales by persuading physicians to write prescriptions, which essentially serve as orders for NPC drugs.

Under California law, "[t]he activities constituting exempt work and non-exempt work shall be construed in the same manner as such terms are construed...under the Fair Labor Standards Act...." IWC Wage Order No. 4-2001-1(A)(2)(f); see also Nordquist v. McGraw-Hill Broad. Co., 32 Cal. App. 4th 555, 572-74 (1995). Ramirez, in highlighting the primary duty/quantitative distinction between the FLSA and California law, does nothing to upset this general principle of statutory interpretation. Having determined that Reps are exempt outside salespersons under the FLSA, this Court may apply the same analysis under California law so long as it determines that Reps spend "more than half" of their

time making sales. Ramirez implies that employees like the Reps, whose sole function is to make sales, will easily meet California's quantitative requirement. See 20 Cal. 4th at 801 ("If a salesperson must travel one hour to destination A in order to attempt a sale, then surely the most reasonable interpretation of the wage order is to count the hour of travel time as time spent 'selling.'"). Reps, then, are appropriately categorized as exempt outside salespersons under California law.[7]

V. The Administrative Exemption

A. The FLSA and New York Law

Even if Plaintiffs do not fall within the outside sales exemption, they are still not entitled to overtime under the FLSA or New York law because they fall within the administrative exemption. Plaintiffs meet each of the administrative exemption's requirements. Their average salary of $91,500 per year translates into a weekly salary of $1,760, which is nearly four times the statutory

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[7] Barnick, Wyeth, and D'Este have been criticized for relying too heavily on "indicia of sales"—such as the fact that the plaintiffs in those cases had sales-related job titles and received specialized sales training—rather than on a direct finding that the plaintiffs actually engaged in sales. See, e.g., Ruggeri, 2008 WL 4889813 at *13-*14. This Court agrees that indicia of sales may not be used as a substitute for an actual finding that an employee made sales in some sense. Nevertheless, it is significant that the Reps are hired, trained, paid and incentivized as sales personnel. Those facts are entitled to some weight, even if they are not solely dispositive.

minimum of $455 per week. Moreover, they engage in work that is directly related to the management or general business operations of NPC and they exercise discretion and independent judgment with respect to matters of significance.

1. Office or Non-Manual Work Directly Related to Management or General Business Operations

The first prong of the administrative exemption consists of two component parts. In order to be exempt, an employee must (1) "perform office or non-manual work" (2) "directly related to the management or general business policies of the employer." See 29 C.F.R. § 541.200(a).

In Reich v. John Alden Life Insurance Company 126 F.3d 1 (1st Cir. 1997), the First Circuit addressed the performance of office or non-manual work through the prism of the DOL's administrative/production dichotomy. John Alden involved the application of the administrative exemption to an insurance company's "marketing representatives," who were the company's primary contacts with the independent agents who ultimately sold the company's life insurance policies. 126 F. 3d at 3. The court held that the representatives did not perform "production" work because the insurance company's products were its insurance policies, and the representatives were not involved in creating those policies. Id. at 9. Rather, they were involved in marketing and promoting the policies—work that was "ancillary" to the insurance company's "principal production activity." Id. at 9-10.

Based upon the holding in John Alden, it is clear that Plaintiffs do not function as production employees. NPC's products are the pharmaceutical drugs that it researches, develops, and manufactures. (See PSUF ¶ 2.) Just as the representatives in John Alden played no role in producing insurance policies, the Reps here have nothing to do with producing NPC's drugs. Their work, like the work of the John Alden marketing representatives, is ancillary to their employer's production work.

With respect to the second part of the analysis, Plaintiffs claim that their work is not directly related to NPC's management or general business operations because they apply policies rather than craft them. In other words, Plaintiffs argue that they carry out day-to-day activities as opposed to performing the types of "high-level" functions the administrative exemption is designed to encompass. (See id. at 4.)

John Alden is instructive here, as well. The court held that the representatives' work was directly related to the insurance company's general business operations because by "disseminating information to the marketplace, understanding customers and competitors, and gathering available information," the representatives were "at the heart of John Alden's business success." John Alden, 126 F.3d at 11-12 & fn.8. The same can be said for NPC's Reps. The parties do not dispute that, in carrying out their duties, one of the Reps' primary functions is to provide information about NPC pharmaceuticals to the physicians they visit. (See PSUF ¶¶ 3, 4.) Moreover, Reps are the only NPC employees who meet directly with physicians. (See Def.'s Rule 56.1

Statement of Undisputed Facts ("DSUF") ¶ 8.) As Defendant claims, Reps "are critical in maintaining NPC's positive relationship with the medical community." (Def. Mem. at 20.)

In Amendola v. Bristol-Myers Squibb, the court reached a similar conclusion with respect to pharmaceutical sales representatives. The court determined that the defendant pharmaceutical company had demonstrated: (1) that the Reps represented the company in meetings with physicians; (2) that the Reps promoted the defendant's drugs; and (3) that defendant's business depended in part upon the Reps' success in educating physicians about its drugs. 558 F. Supp. 2d 459 at 476-77. Consequently, it was clear that the Reps "perform[ed] non-manual work directly related to the general business operations of the company." Id. at 476.[8] On the present record, there is no doubt that NPC's Reps meet with physicians and provide them with information about NPC drugs in an attempt to

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[8] In the only other decision in this Circuit to analyze the applicability of the administrative exemption to pharmaceutical sales representatives—Ruggeri—the court held that it could not make a determination as to whether the Reps' work was directly related to the defendant pharmaceutical company's general business operations because the record did not provide sufficient evidence of what the company's business operations entailed. 2008 WL 4889813 at *15-*16. Here, however, the Court is satisfied that NPC's general business operations can be said to involve researching, developing, manufacturing, marketing, and selling prescription pharmaceuticals. (Arena Aff. ¶ 4; see also DSUF ¶ 2; Pls.' Response to Def.'s 56.1 Statement at 2.) The Reps' work is directly related to these operations.

persuade the physicians to write prescriptions for those drugs. The Reps' success in obtaining prescriptions is critical to NPC's business. The sizeable incentive payments made to Reps for generating prescriptions, as well as the more than $500 million paid to the 6,000 Reps, buttresses the conclusion that obtaining prescriptions for its drugs is critical to NPC's success. There is no other rational explanation for the commitment of this level of financial resources to NPC's sales effort.

2. Exercise of Discretion and Independent Judgment with Respect to Matters of Significance

In Cote v. Burroughs Wellcome Co., 558 F. Supp. 883 (E.D. Pa. 1982), the court directly addressed the issue of whether the plaintiff "detailer" (as Reps were then known) exercised discretion and independent judgment with respect to matters of significance. The court determined that, notwithstanding the restrictions placed upon her activities by her employer (which mirror the FDA's restrictions on the marketing and sales of drug products), the detailer exercised considerable discretion. Specifically, the court found that the detailer (1) used initiative to increase sales of her assigned drugs by cultivating good working relationships with doctors and their staffs, and (2) used discretion in deciding how to encourage the use of her product. Id. at 887. The

court therefore concluded that the plaintiff detailer fell within the FLSA's administrative exemption.[9]

More recently, the court in Amendola reached a similar conclusion. The court determined that the plaintiff pharmaceutical sales representatives (1) "tailor[ed] the content of their presentations to each medical provider based on the provider's patient population, prescription practices, and other factors, and independently decide[d] what promotional message [would] be most effective"; (2) determined whether to request a "commitment" (analogous to a "close" in the present case) and, if a commitment request was appropriate, the nature of that commitment; (3) determined how often to visit each physician; (4) added new physicians to their call lists; (5) allocated their drug samples; and (6) decided how to spend their promotional budgets on meals and lecture programs for their physicians. 558 F. Supp. 2d at 477. Moreover, the court recognized as self-evident the fact that these discretionary activities related to matters of significance since "[Reps] seek to influence prescription writing practices—a matter of great consequence to [defendant's] business." Id. While the Amendola court's findings were made in determining whether notice to the potential plaintiff class was appropriate, id. at 462-63, it is instructive that the court found that the second requirement of the administrative exemption was likely satisfied. Id. at 477.

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[9] The court in Cote did not need to address the issue of whether the detailer performed work directly related to her employer's management or general business operations because the defendant employer conceded that she did. 558 F. Supp. at 886.

Cote and Amendola are directly applicable here. Plaintiff Reps engage in many of the same discretionary activities. Reps are expected to use initiative to increase the number of prescriptions written for their drugs—oftentimes, this involves building a good rapport with the physicians and their staffs. Within the confines of the "core messages" created by NPC, Reps must decide how best to present their information and must determine what type of "close" is most appropriate in a given situation. This, of course, depends on how much time the physician will allow the Rep, the physician's patient base and prescribing history, and numerous other factors. Reps set their daily call schedules and are expected to use their entertainment budgets to host informational events for the physicians on their target lists. In carrying out these activities, they are quite clearly attempting to increase prescriptions for their drugs—a matter of considerable significance for NPC. In short, the discretionary nature of their duties closely resembles that of the plaintiffs in Cote and Amendola.

Throughout their papers, and at oral argument, Plaintiffs have characterized themselves as mere "robots" or "automatons" who enjoy no room to act with discretion or independent judgment within the stringent confines of NPC's regulations. (See, e.g., Pl. Mem. at 12-15; OA Tr. at 32:5-18.) These labels are not facts, but merely arguments designed to avoid the overtime exemptions. They do not begin to answer why or how a robot or an automaton could or should earn an average salary of $91,500 per year. Nor do they explain why NPC would employ 6,000 Reps at a cost in excess of half a billion dollars per

year. They are an attempt to avoid the consequences of what Reps do every day—arranging to call on physicians and, after assessing how much time is available for the call, choosing the best possible approach to convince the physician to prescribe NPC drugs the next time an appropriate patient opportunity presents itself. NPC pays a good salary and material incentives to encourage this behavior. Reps are given drug samples, printed materials, and core messages. They are dispatched to the offices of physicians in an attempt to convince those physicians to prescribe NPC products. It defies logic to accept that, in such a situation, Reps are expected to do nothing but chant slogans and mouth platitudes. At the bare minimum, Reps must be capable of tailoring their presentation to a given timeframe—deciding how best to convey the "core message" in a manner that will have the desired effect on the physician. Such a decision involves making an independent judgment, free of direct oversight, even if NPC has provided Reps with guidelines for conveying certain information in a certain manner. Thus, while the exact nature of the discretion and independent judgment exercised by Reps may be in dispute, Cote and Amendola make clear that, on the present facts, NPC's Reps have discretion and exercise independent judgment.

Courts routinely hold that employees may exercise discretion and independent judgment, even when they carry out their duties within the confines of a highly regulated industry. See, e.g., Amendola, 558 F. Supp. 2d at 476 (recognizing that "courts have frequently concluded that the administrative exemption applies even in those situations in which

the employee's discretion in the performance of her duties is circumscribed by an employer's detailed instructions or industry regulations" (citations omitted)). At oral argument, Plaintiffs readily admitted that "because of the [pharmaceutical industry's] regulations, the [R]eps are tightly circumscribed." (OA Tr. at 33:9-10.) Within these regulations, however, the Reps do exercise ample discretion and make independent judgments. This fully satisfies the second requirement of the administrative exemption. Thus, under the FLSA and New York law, Plaintiffs are appropriately categorized as exempt administrative employees.

B. California Law

California employs a five-part test for determining whether an employee is covered by the state's administrative exemption. In order for the exemption to apply, the employee must: (1) perform "office or non-manual work directly related to management policies or general business operations" of the employer or its customers; (2) "customarily and regularly exercise...discretion and independent judgment"; (3) perform his or her duties under only general supervision; (4) be "primarily engaged" in activities meeting the test for the exemption; and (5) earn twice the state's minimum wage. Cal. Code Reg., tit. 8, § 11070(1)(A)(2). As is the case with the outside sales exemption, the primary difference between the FLSA and California versions of the administrative exemption is California's quantitative test. As previously discussed, Reps do not perform the types of dual functions that typically necessitate a quantitative analysis. Having determined that the function they do perform qualifies as administrative

under the FLSA, the Court need not undertake further analysis to conclude that Reps are similarly exempt administrative employees under California law.

VI. Highly Compensated Employee Exemption

Defendant identifies certain members of the Plaintiff class who it claims fall within the highly compensated employee exemption because (1) they earned at least $100,000 in annual compensation in the years 2004 through 2006, and (2) they customarily and regularly performed the duties of an administrative employee. (Def. Mem. at 27-28; App'x to Def. Mem. Tab 46.)[10] The Court has already determined that Plaintiffs are exempt from the FLSA's overtime requirement because they qualify as outside salespersons and administrative employees. Thus, to the extent the Plaintiffs identified by Defendant did, in fact, earn at least $100,000 in annual compensation between 2004 and 2006, they also meet the requirements for the highly compensated employee exemption. Since the Court has already held the Plaintiff class in its entirety exempt on other grounds, however, it need not reach the subordinate issue of whether certain Plaintiffs fall within this exemption.

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[10] According to NPC, of the nearly 700 members of the Plaintiff class, 42 earned total compensation in excess of $100,000 in 2004, 49 in 2005, and 31 in 2006. (App'x to Def. Mem. Tab 46.)

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is GRANTED Plaintiffs' motion for summary judgment is DENIED. The Clerk of the Court is directed to enter judgment and terminate this matter.

Dated: New York, New York
January 12, 2009

SO ORDERED

/s/ Paul A. Crotty
PAUL A. CROTTY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE NOVARTIS WAGE AND HOUR LITIGATION

06 **MD** 1794 (PAC)

JUDGMENT

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Whereas the above-captioned action having come before this Court, and the matter having come before the Honorable Paul A. Crotty, United States District Judge, and the Court, on January 12, 2009 having rendered its Opinion and Order granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment, and directing the Clerk of the Court to enter judgment and terminate this matter, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated January 12, 2009, defendant's motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied; accordingly, the case is closed.

Dated: New York, New York
January 13, 2009

J. MICHAEL McMAHON

Clerk of Court

BY:

/s/

Deputy Clerk

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON _____

29 U.S.C. § 207

§ 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date

of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * *

29 U.S.C. § 213

§ 213. Exemptions

(a) Minimum wage and maximum hour requirements

The provisions of sections 206 (except subsection (d) in the case of paragraph (1) of this subsection) and 207 of this title shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub. L. 101–157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub. L. 101–157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939.

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations,

including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such

employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub. L. 93–259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69.

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub. L. 93–259, § 10(a), Apr. 8, 1974, 88 Stat. 63.

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub. L. 93–259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69.

(15) any employee employed on a casual basis in domestic service employment to provide

babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is—

(A) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) the design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

* * * *

29 U.S.C. §203

§ 203. Definitions

As used in this chapter—

* * * *

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

* * * *

29 C.F.R. § 541

Subpart C—Administrative Employees

§ 541.200 General rule for administrative employees.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

§ 541.201 Directly related to management or general business operations.

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or

general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

§ 541.202 Discretion and independent judgment.

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and

bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may

have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to

matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

§ 541.203 Administrative exemption examples.

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing

all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are

performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient

knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

§ 541.204 Educational establishments.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term "other educational establishment" includes special schools for mentally or physically disabled or gifted children, regardless

of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether postsecondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase "performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the

administration of the mathematics department, the English department, the foreign language department, etc.; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under § 541.200 or under other sections of this part, provided the requirements for such exemptions are met.

29 C.F.R. § 541

Subpart F—Outside Sales Employees

§ 541.500 General rule for outside sales employees.

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

§ 541.501 Making sales or obtaining orders.

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the outside sales exemption to employees who sell or take orders for a

service, which may be performed for the customer by someone other than the person taking the order.

§ 541.502 Away from employer's place of business.

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.*, one or two weeks) should not be considered as the employer's place of business.

§ 541.503 Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending

upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct

efforts toward the consummation of a sale, the work is not exempt outside sales work.

§ 541.504 Drivers who sell.

(a) Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work.

(b) Several factors should be considered in determining if a driver has a primary duty of making sales, including, but not limited to: a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

(c) Drivers who may qualify as exempt outside sales employees include:

(1) A driver who provides the only sales contact between the employer and the customers visited,

who calls on customers and takes orders for products, who delivers products from stock in the employee's vehicle or procures and delivers the product to the customer on a later trip, and who receives compensation commensurate with the volume of products sold.

(2) A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.

(3) A driver who calls on new prospects for customers along the employee's route and attempts to convince them of the desirability of accepting regular delivery of goods.

(4) A driver who calls on established customers along the route and persuades regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery was made by someone else.

(d) Drivers who generally would not qualify as exempt outside sales employees include:

(1) A route driver whose primary duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations.

(2) A driver who often calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call when the sale was not significantly affected by solicitations of the customer by the delivering

driver or the amount of the sale is determined by the volume of the customer's sales since the previous delivery.

(3) A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers (including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves, in coolers or in cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases), unless such work is in furtherance of the driver's own sales efforts.

69 Fed. Reg. 22122

DEPARTMENT OF LABOR
Wage and Hour Division
29 CFR Part 541
RIN 1215-AA14

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the text of final regulations under the Fair Labor Standards Act implementing the exemption from minimum wage and overtime pay for executive, administrative, professional, outside sales and computer employees. These exemptions are often referred to as the "white collar" exemptions. To be considered exempt, employees must meet certain minimum tests related to their primary job duties and, in most cases, must be paid on a salary basis at not less than minimum amounts as specified in pertinent sections of these regulations.

EFFECTIVE DATE: These rules are effective on August 23, 2004.

* * * *

SUPPLEMENTARY INFORMATION:

I. Summary of Major Changes and Economic Impact

The minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA) are among the nation's most important worker protections. These protections have been severely eroded, however, because the Department of Labor has not updated the regulations defining and delimiting the exemptions for "white collar" executive, administrative and professional employees. By way of this rulemaking, the Department seeks to restore the overtime protections intended by the FLSA.

Under section 13(a)(1) of the FLSA and its implementing regulations, employees cannot be classified as exempt from the minimum wage and overtime requirements unless they are guaranteed a minimum weekly salary and perform certain required job duties. The minimum salary level was last updated in 1975, almost 30 years ago, and is only $155 per week. The job duty requirements in the regulations have not been changed since 1949-almost 55 years ago.

Revisions to both the salary tests and the duties tests are necessary to restore the overtime protections intended by the FLSA which have eroded over the decades. In addition, workplace changes over the decades and federal case law developments are not reflected in the current regulations. Under the existing regulations, an employee earning only $8,060 per year may be classified as an "executive" and denied overtime pay. By comparison, a minimum

wage employee earns about $10,700 per year. The existing duties tests are so confusing, complex and outdated that often employment lawyers, and even Wage and Hour Division investigators, have difficulty determining whether employees qualify for the exemption. The existing regulations are very difficult for the average worker or small business owner to understand. The regulations discuss jobs like key punch operators, legmen, straw bosses and gang leaders that no longer exist, while providing little guidance for jobs of the 21st Century.

Confusing, complex and outdated regulations allow unscrupulous employers to avoid their overtime obligations and can serve as a trap for the unwary but well-intentioned employer. In addition, more and more, employees must resort to lengthy court battles to receive their overtime pay. In the Department's view, this situation cannot be allowed to continue. Allowing more time to pass without updating the regulations contravenes the Department's statutory duty to "define and delimit" the section 13(a)(1) exemptions "from time to time."

Accordingly, on March 31, 2003, the Department published a Notice of Proposed Rulemaking (68 FR 15560) suggesting changes to the Part 541 regulations, including the largest increase of the salary levels in the 65-year history of the FLSA. The proposed changes to the duties tests were designed to ensure that employees could understand their rights, employers could understand their legal obligations, and the Department could vigorously enforce the law.

During a 90-day comment period, the Department received 75,280 comments from a wide variety of employees, employers, trade and

professional associations, small business owners, labor unions, government entities, law firms and others. In addition, the Department's proposal prompted vigorous public policy debate in Congress and the media. The public commentary revealed significant misunderstandings regarding the scope of the "white collar" exemptions, but also provided many helpful suggestions for improving the proposed regulations.

After carefully considering all of the relevant comments, and as detailed in this preamble, the Department has made numerous changes from the proposed rule to the final rule, including the following:

* * * *

Salary

- The final rule nearly triples the current $155 per week minimum salary level required for exemption to $455 per week-a $30 per week increase over the proposal and a $300 per week increase over the existing regulations.
- The "highly compensated" test in the final rule applies only to employees who earn at least $100,000 per year, a $35,000 increase over the proposal.
- The "highly compensated" test in the final rule applies only to employees who receive at least $455 per week on a salary basis.
- The final regulation adds a new requirement that exempt highly compensated employees also must "customarily and regularly" perform exempt duties.

* * * *

Administrative

- The final rule eliminates the proposed "position of responsibility" test for the administrative exemption.
- The final rule eliminates the proposed "high level of skill or training" standard under the administrative exemption.
- The final rule retains the existing requirement (deleted in the proposed regulations) that exempt administrative employees must exercise discretion and independent judgment.

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II. Background

The FLSA generally requires covered employers to pay employees at least the federal minimum wage for all hours worked, and overtime premium pay of time-and-one-half the regular rate of pay for all hours worked over 40 in a single workweek. However, the FLSA includes a number of exemptions from the minimum wage and overtime requirements. Section 13(a) (1) of the FLSA provides an exemption from both minimum wage and overtime pay for "any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *)." 29 U.S.C. 213(a)(1).

Congress has never defined the terms "executive," "administrative," "professional," or "outside salesman." Although section 13(a)(1) was included in the original FLSA enacted in 1938, specific references to the exemptions in the legislative history are scant. The legislative history indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay. Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA's time-and-a-half overtime premium. *See* Report of the Minimum Wage Study Commission, Volume IV, pp. 236 and 240 (June 1981).

Pursuant to Congress' specific grant of rulemaking authority, the Department of Labor has issued implementing regulations, at 29 CFR Part 541, defining the scope of the section 13(a)(1) exemptions. Because the FLSA delegates to the Secretary of Labor the power to define and delimit the specific terms of these exemptions through notice-and-comment rulemaking, the regulations so issued have the binding effect of law. *See Batterton v. Francis*, 432 U.S. 416, 425 n. 9 (1977).

The existing Part 541 regulations generally require each of three tests to be met for the

exemption to apply: (1) The employee must be paid a predetermined and fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet minimum specified amounts (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations (the "duties tests").[1]

The major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years. The FLSA became law on June 25, 1938, and the first version of Part 541 was issued later that year in October. 3 FR 2518 (Oct. 20, 1938). After receiving many comments on the original regulations, the Wage and Hour Division issued revised regulations in 1940. 5 FR 4077 (Oct. 15, 1940). *See also,* "Executive, Administrative, Professional * * * Outside Salesman" Redefined, Wage and Hour Division, U.S. Department of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition (Oct. 10, 1940) ("1940 Stein Report"). The Department issued the last major revision of the duties test regulatory provisions in 1949. 14 FR 7705 (Dec. 24, 1949). Also in 1949, an explanatory bulletin interpreting some of the terms in the regulatory provisions was published as Subpart B of Part 541.

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[1] A number of states arguably have more stringent exemption standards than those provided by Federal law. The FLSA does not preempt any such stricter State standards. If a State or local law establishes a higher standard than the provisions of the FLSA, the higher standard applies. *See* Section 18 of the FLSA, 29 U.S.C. § 218.

14 FR 7730 (Dec. 28, 1949). *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("1949 Weiss Report"). In 1954, the Department issued the last major revisions to the regulatory interpretations of the "salary basis" test. 19 FR 4405 (July 17, 1954). After the initial minimum salary levels were set at $30 per week in 1938, the Department revised the Part 541 regulations to increase the salary levels in 1940, 1949, 1958, 1963, 1970 and 1975. 5 FR 4077 (Oct. 15, 1940); 14 FR 7705 (Dec. 24, 1949); 23 FR 8962 (Nov. 18, 1958); 28 FR 9505 (Aug. 30, 1963); 35 FR 883 (Jan. 22, 1970); 40 FR 7092 (Feb. 15, 1975). *See also*, Report and Recommendations on Proposed Revisions of Regulations, Part 541, under the Fair Labor Standards Act, by Harry S. Kantor, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (March 3, 1958) ("1958 Kantor Report").[2]

The framework of the existing Part 541 regulation is based upon the 1940 Stein Report, the 1949 Weiss Report and the 1958 Kantor report, which reflect the best evidence of the American workplace a half-century ago. The existing

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[2] Revisions to increase the salary rates in January 1981 were stayed indefinitely. 46 FR 11972 (Feb. 12, 1981). The Department also revised the regulations to accommodate statutory amendments to the FLSA in 1961, 1967, 1973, and 1992. 26 FR 8635 (Sept. 15, 1961); 32 FR 7823 (May 30, 1967); 38 FR 11390 (May 7, 1973); 57 FR 37677 (Aug. 19, 1992); 57 FR 46744 (Oct. 9, 1992).

regulation, therefore, reflects the structure of the workplace, the type of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long been altered. As the workplace and structure of our economy has evolved, so, too, must Part 541 be modernized to remain current and relevant. This necessary adaptation forms the philosophical underpinnings of this update and reflects the Department's efforts to remain true to the intent of Congress, which mandated that the DOL "from time to time" define and delimit these exemptions and the myriad terms contained therein.

The Department notes, however, that much of the reasoning of the Stein, Weiss and Kantor reports remains as relevant as ever. This preamble notes such instances, and articulates why the reasoning is still sound. However, while the Department carefully has reviewed these reports in undertaking this update, it is not bound by the reports. The Department is responsible for updating regulations that, with each passing decade of inattention, have become increasingly out of step with the realities of the workplace. Indeed, under this rulemaking, the Department is charged with utilizing record evidence submitted in 2003 * * * not in the 1940s or 1950s * * *in exercising its discretion to update the terms of this Part.

Suggested changes to the Part 541 regulations have been the subject of extensive public commentary for two decades, including public comments responding to an Advance Notice of Proposed Rulemaking issued by the Department in

November 1985,[3] a March 1995 oversight hearing by the Subcommittee on Workforce Protections of the Committee on Economic and Educational Opportunities, U.S. House of Representatives, a report issued by the General Accounting Office (GAO) in September 1999,[4] and a May 2000 hearing before the Subcommittee on Workforce Protections of the Committee on Education and the Workforce, U.S. House of Representatives. In its 1999 report to Congress and at the May 2000 hearing, the GAO chronicled the background and history of the exemptions, estimated the number of workers who might be included within the scope of the exemptions, identified the major concerns of employers and employees regarding the exemptions, and suggested possible solutions to the issues of concern raised by the affected interests. In general, the employers contacted by the GAO were concerned that the regulatory tests are too complicated, confusing, and outdated for the modern workplace, and create potential liability for violations when errors in classification occur. Employers were particularly concerned about potential liability for violations of the complex "salary basis" test, and complained that the "discretion and independent judgment" standard for administrative employees is confusing and applied inconsistently by the Wage and Hour Division. They also noted the traditional limits of the exemptions have blurred in the modern

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[3] 50 FR 47696 (Nov. 11, 1985).

[4] Fair Labor Standards Act: White Collar Exemptions in the Modern Work Place, GAO/HEHS-99-164, September 30, 1999 (GAO Report).

workplace. Employee representatives contacted by the GAO, in contrast, were most concerned that the use of the exemptions be limited to preserve existing overtime work hour limits and the 40-hour standard workweek for as many employees as possible. They believed thc tests have become weakened as applied today by judicial rulings and do not adequately restrict employers' use of the exemptions. When combined with the low salary test levels, the employee representatives felt hat few protections remain, particularly or low-income supervisory employees. The GAO Report noted that the conflicting interests affected by these rules have made consensus difficult and that, since the FLSA was enacted, the interests of employers to expand the white collar exemptions have competed with those of employees to limit use of the exemptions. To resolve the issues presented, the GAO suggested that employers' desires for clear and unambiguous regulatory standards must be balanced with employees' desires for fair and equitable treatment in the workplace. The GAO recommended that the Secretary of Labor comprehensively review the regulations and restructure the exemptions to better accommodate today's workplace and to anticipate future workplace trends.

Responding to the extensive public commentary, on March 31, 2003, the Department published proposed revisions to these regulations in the **Federal Register** inviting public comments for 90 days (*see* 68 FR 15560; March 31, 2003). In response to the proposed rule, the Department received a total of 75,280 comments during the official comment period. The Department received comments from a wide variety of individuals, employees, employers,

trade and professional associations, labor unions, governmental entities, Members of Congress, law firms, and others. Most of the comments received were form letters submitted by e-mail or facsimile. Form letters expressing general support of the proposal were received, for example, from members of the Society for Human Resource Management and from individuals who identified themselves as being in agreement with the HR Policy Association or the National Funeral Directors Association. More than 90 percent of the comments were form letters generated by organizations affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) expressing general opposition to the proposal. These largely identical submissions raise concerns that the proposal would, for example, "diminish the application of overtime pay and seriously erode the 40 hour workweek" and lead to "[c]utting overtime pay" which "would really hurt America's working families." The form letters, however, do not address any particular aspect of the changes being proposed to the existing regulations. Indeed, some letters and emails appear to be from individuals who clearly perform non-exempt duties and are not covered by the Part 541 exemptions.

Approximately 600 of the comments include substantive analysis of the proposed revisions. Virtually all of these 600 comments favor some change to the existing regulations. Among the commenters there are a wide variety of views on the merits of particular sections of the proposed regulations. Acknowledging that there are strong views on the issues presented in this rulemaking, the Department has carefully considered all of the

comments and the arguments made for and against the proposed changes.

The major comments received on the proposed regulatory changes are summarized below, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received. In addition to the more substantive comments discussed below, the Department received some editorial suggestions, some of which have been adopted and some of which have not. A number of other minor editorial changes have been made to better organize or structure the regulatory text. Finally, a number of comments were received on issues that go beyond the scope or authority of these regulations (such as eliminating all exemptions from overtime, lowering the overtime threshold to fewer hours worked per week or per day, banning all mandatory overtime, and basing overtime on a twoweek/ 80-hour limit), which the Department will not address in the discussion that follows.

III. Authority of the Secretary of Labor

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Several commenters, including the AFL-CIO, claim that the proposal exceeds the authority of the Secretary and will not be entitled to judicial deference. They assert that the proposal improperly broadens the exemptions, fails to safeguard employees from being misclassified, and is not consistent with Congressional intent. As an initial matter, the Supreme Court's decision in *Auer* confirmed the Secretary's "broad authority" to define and delimit these exemptions. 519 U.S. at 456.

Moreover, as this preamble establishes, the final rule will simplify, clarify and better organize the regulations defining and delimiting the exemptions for administrative, executive and professional employees. Rather than broadening the exemptions, the final rule will enhance understanding of the boundaries and demarcations of the exemptions Congress created. The final rule will protect more employees from being misclassified and reduce the likelihood of litigation over employee classifications because both employees and employers will be better able to understand and follow the regulations.

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IV. Summary of Major Comments

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Structure and Organization

The existing Part 541 contains two subparts. Current Subpart A provides the regulatory tests that define each category of the exemption (executive, administrative, professional, and outside sales). Current Subpart B provides interpretations of the terms used in the exemptions. Subpart B was first issued as an explanatory bulletin in 1949 (effective in January 1950) to provide guidance to the public on how the Wage and Hour Division interpreted and applied the exemption criteria when enforcing the FLSA.

The Department proposed to eliminate this distinction between the "regulations" in Subpart A and the "interpretations" in Subpart B. The proposed

rule also reorganized the subparts according to each category of exemption, eliminated outdated and uninformative examples, updated definitions of key terms and phrases, and consolidated provisions relevant to several or all of the exemption categories into unified, common sections to eliminate unnecessary repetition (*e.g.*, a number of sections pertaining to salary issues were proposed to be consolidated into a new Subpart G, Salary Requirements, discussed below). The proposed rule also streamlined, reorganized, and updated the regulations in other ways. The proposed regulations utilized objective, plain language in an attempt to make the regulations more understandable to employees and employee representatives, small business owners and human resource professionals. This proposed restructuring of Part 541 was intended to consolidate and streamline the regulatory text, reduce unnecessary duplication and redundancies, make the regulations easier to understand and decipher when applying them to particular factual situations, and eliminate the confusion regarding the appropriate level of deference to be given to the provisions in each subpart.

The proposed regulations also streamlined the existing regulations by adopting a single standard duties test for each exemption category, rather than the existing "long" and "short" duties tests structure. Because of the outdated salary levels, the "long" duties tests have, as a practical matter, become effectively dormant. As the American Payroll Association states, the "long" duties tests have "become 'inoperative' because of the extremely low minimum salary test ($155 per week) and federal

courts' refusal to apply the percentage restrictions on nonexempt work in the modern workplace." The U.S. Chamber of Commerce similarly notes that the "elements unique to the long test have largely been dormant for some time due to the compensation levels." The U.S. House of Representatives' Committee on Education and the Workforce also comments that the "long" duties tests have "become rarely, if ever, used." The Fisher & Phillips law firm notes that "the 'long' test has played little role in the executive exemption's application for many years." Similarly, the American Bakers Association notes that the "long" duties tests "lack[] current relevance." Finally, the National Association of Federal Wage Hour Consultants states that the "long" duties tests are "seldom used today in the business community." Faced with this reality, the Department decided that elimination of most of the "long" duties tests requirements is warranted, especially since the relatively small number of employees currently earning from $155 to $250 per week, and thus tested for exemption under the "long" duties tests, will gain stronger protections under the increased minimum salary level which, under the final rule, guarantees overtime protection for all employees earning less than $455 per week ($23,660 annually). Further, as explained in the preamble to the proposed rule, the former tests are complicated and require employers to time-test managers for the duties they perform, hour-by-hour in a typical workweek. Reintroducing these effectively dormant requirements now would add new complexity and burdens to the exemption tests that do not currently apply. For example, employers are not generally required to maintain any records of daily or weekly hours worked by

exempt employees (*see* 29 CFR 516.3), nor are they required to perform a moment-by-moment examination of an exempt employee's specific duties to establish that an exemption is available. Yet reactivating the former strict percentage limitations on nonexempt work in the existing "long" duties tests could impose significant new monitoring requirements (and, indirectly, new recordkeeping burdens) and require employers to conduct a detailed analysis of the substance of each particular employee's daily and weekly tasks in order to determine if an exemption applied. When employers, employees, as well as Wage and Hour Division investigators applied the "long" test exemption criteria in the past, distinguishing which specific activities were inherently a part of an employee's exempt work proved to be a subjective and difficult evaluative task that prompted contentious disputes. Moreover, making such finite determinations would become even more difficult in light of developments in case law that hold that an exempt employee's managerial duties can be carried out at the same time the employee performs nonexempt manual tasks. *See, e.g.*, *Jones v. Virginia Oil Co.*, 2003 WL 21699882, at *4 (4th Cir. 2003) (assistant manager who spent 75 to 80 percent of her time performing basic line-worker tasks held exempt because she "could simultaneously perform many of her management tasks"); Donovan v. Burger King Corp., 672 F.2d 221, 226 (1st Cir. 1982) ("an employee can manage while performing other work," and "this other work does not negate the conclusion that his primary duty is management"). Accordingly, given these developments, the Department believed that the percentage limitations on particular duties

formerly applied under the "long" tests were not useful criteria that should be reintroduced for defining the "white collar" exemptions in today's workplace, and that employees who would have been tested under the "long" tests are better protected by the final rule's guarantee of overtime protection to all employees earning less than $455 per week.

Most comments addressing the structure and organization of the proposed rule generally favor the proposed restructuring, indicating the consolidation of the former regulations and interpretations into a unified set of rules and other proposed changes provide needed simplification and more clarity to a complex regulation. The weight of comments support replacing the former "long" and "short" test structure with the proposed standard tests and deleting the former "long" test percentage limits on performing nonexempt duties.[5] For example, the U.S. Chamber

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[5] *See, e.g.*, Comments of American Bakers Association; American Corporate Counsel Association; American Hotel and Lodging Association; American Insurance Association; American Nursery and Landscape Association; American Payroll Association; American Network of Community Options and Resources (ANCOR); Associated Builders and Contractors; Associated Prevailing Wage Contractors; Colley & McCoy Company; Contract Services Association of America; Financial Services Roundtable; Grocery Manufacturers of America; National Association of Chain Drug Stores; National Association of Manufacturers; National Council of Agricultural Employers; National Grocers Association; National Newspaper Association; National Restaurant Association; National Small Business Association; New Jersey Restaurant Association; Pennsylvania Credit Union Association; Public Sector FLSA Coalition; Society for Human Resource Management; State of Oklahoma Office of Personnel Management; Tennessee Valley

of Commerce comments that it was their members' experience that the percentage limitations have been difficult to apply and have been of little utility. The Associated Prevailing Wage Contractors states that the percentage requirements created additional and needless recordkeeping requirements. The National Small Business Association comments that a move away from a percentage basis test will alleviate the burden on small business owners.

However, some commenters oppose these changes, asserting that they weakened the requirements for exemption, would allow manipulation of job titles to evade paying overtime to lower-level employees, would open the floodgates to misclassification of employees, and lead to more lawsuits. Some commenters state that the proposed language is too simple for this complex subject or that the proposed language continues to be vague in some areas, making it susceptible to differing interpretations and a continuation of an overly complex subject under the law. Other dissenting comments point to a loss of judicial and opinion letter interpretative precedent that would occur by changing the duties tests as the Department proposed.[6]

Authority; the U.S. Chamber of Commerce; and Virginia Department of Human Resource Management.

[6] *See, e.g.*, Comments of 9-5 National Association of Working Women; AFL-CIO; American Federation of State, County and Municipal Employees; American Federation of Teachers; Building and Construction Trades Department, AFL-CIO; Communication Workers of America; International Association of Fire Fighters; International Association of Machinists and

The Department has carefully considered these arguments, and continues to believe that reducing the inherent complexity of the exemption criteria by replacing the subjective and effectively dormant "long" test requirements is an essential goal to be pursued in this rulemaking. Streamlining and simplification of the applicable standards is critical to ensuring correct interpretations and proper application of the exemptions in the workplace today. It serves no productive interest if a complicated regulatory structure implementing a statutory directive means that few people can arrive at a correct conclusion, or that many people arrive at different conclusions, when trying to apply the standards to widely varying and diverse employment settings. The extensive public comments on the difficulties experienced under the existing regulatory standards amply demonstrate the need for change, in the Department's view. The comments suggesting there is no need to change the current regulatory "long" and "short" test structure are not persuasive when contrasted with the described difficulties under the existing regulatory standards, as confirmed by many other commenters. The Department also does not agree with the comments suggesting that elimination of the "long" test percentage limitations on nonexempt work, which are rarely applied today, and retention of the primary duty approach as currently interpreted by federal courts, will somehow

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Aerospace Workers; International Federation of Professional & Technical Engineers; National Employment Law Project; New York State Public Employees Federation; United Food and Commercial Workers Union; Weinberg, Roger and Rosenfeld; and World at Work.

increase litigation or decrease the protections currently afforded to employees. Rather, we believe that employees are more clearly protected by the final rule, which guarantees overtime protection to all employees earning less than $455 per week, than by the existing rule which contains confusing and differing requirements for employees earning between $155 and $455 per week. Moreover, as explained in more detail in Subpart B of the preamble, the Department's final "standard" duties test for the executive exemption incorporates the "authority to hire or fire" requirement from the existing long test.

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Subpart C, Administrative Employees

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Section 541.202 Discretion and Independent Judgment (Proposed "Position of Responsibility")

As discussed above, the Department has decided to eliminate the proposed "position of responsibility" requirement. Thus, the final rule deletes proposed section 541.202 defining "position of responsibility," proposed section 541.203 defining "substantial importance," and proposed section 541.204 defining "high level of skill or training." Instead, the final rule reinserts the "discretion and independent judgment" requirement, and defines that term at final section 541.202. Some of the language in proposed sections 541.203 and 541.204 was retained from the existing regulations and also appears in the final regulations as described below. The language from proposed

section 541.204 regarding the use of manuals has been moved to a new section in Subpart H, Definitions and Miscellaneous Provisions, and is discussed under that subpart.

The Department continues to believe, as most commenters confirm, that the current discretion and independent judgment standard has caused confusion and unnecessary litigation. Even in the 1949 Weiss Report, the Department recognized that the "discretion and independent judgment" standard was somewhat subjective, and the difficulty of applying the standard consistently has increased with the passing decades. As evidenced by the increasing court litigation, it has become progressively more difficult to apply the standard with the creation of many new jobs that did not exist 50 years ago. Nonetheless, the vast majority of commenters express concern that abandoning the "discretion and independent judgment" standard entirely would create even more uncertainty and litigation. We also recognize the benefit of retaining the standard in some form so as not to jettison completely decades of federal court decisions and agency opinion letters.

Accordingly, while retaining this standard from the existing regulations, final section 541.202 clarifies the definition of discretion and independent judgment to reflect existing federal case law and to eliminate outdated and confusing language in the existing interpretive guidelines. The Department intends the final rule to clarify the existing standard and to make the standard easier to understand and apply to the 21st Century workplace.

Final section 541.202(a) thus restates the requirement that the exempt administrative

employee's primary duty must "include" the exercise of discretion and independent judgment and includes the general definition of this term, taken word-for-word from the existing interpretive guideline at subsection 541.207(a): "In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered." The requirement that the primary duty must "include" the exercise of discretion and independent judgment-rather than "customarily and regularly" exercise discretion and independent judgment-is not a change from current law. Although the Department is aware that there has been some confusion regarding the appropriate standard under the existing "short" duties test, federal court decisions have recognized that the current "short" duties test does not require that the exempt employee "customarily and regularly" exercise discretion and independent judgment, as does the effectively dormant "long" test. *See, e.g., O'Dell v. Alyeska Pipeline Service Co.*, 856 F.2d 1452, 1454 (9th Cir. 1988) (district court erred in not applying more lenient "includes" standard under short test which made a difference in determining whether employee was exempt); *Dymond v United States Postal Service*, 670 F.2d 93, 95 (8th Cir. 1982) (while the "long" duties test for the administrative exemption requires that the employee "customarily and regularly" exercise discretion and independent judgment, when an employee makes more than $250 a week, "that requirement is reduced to requiring that the employee's primary duty simply 'includes

work requiring the exercise of discretion and independent judgment').

Also retained from existing subsection 541.207(a), the final subsection 541.202(a) provides that discretion and independent judgment must be exercised "with respect to matters of significance." Final subsection 541.202(a) states that the term "matters of significance" refers to "the level of importance or consequence of the work performed." This concept of the importance or high level of work performed does not appear as a regulatory requirement in existing section 541.2, but is included twice in the existing interpretive guidance. Existing section 541.205(a), defining the primary duty requirement, states that the administrative exemption is limited "to persons who perform *work of substantial importance* to the management or operation of the business." This language was the basis of the "work of substantial importance" option in the proposed definition of'position of responsibility." Existing section 541.207(a), defining the term "discretion and independent judgment" provides that an exempt administrative employee "has the authority or power to make an independent choice, free from immediate direction or supervision and *with respect to matters of significance.*"

The existing regulations use these two different phrases found in two different sections to describe the same general concept-that the work performed by an exempt administrative employee must be significant, substantial, important, or of consequence. *See, e.g., Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 535-43 (7th Cir. 1999). The words "substantial" and "significant" are synonyms. Existing section 541.207(d) describes the "matters of

significance" concept as requiring that "the discretion and independent judgment exercised must be real and substantial, that is, they must be exercised with respect to matters of consequence." Further, existing section 541.205 and existing section 541.207 use some of the same examples *(i.e.,* personnel clerks, inspectors, buyers) to illustrate the meaning of "substantial importance" and the meaning of "matters of significance."

Describing the same concept using two different phrases in two different sections of the existing interpretive guidelines is duplicative and confusing. Accordingly, the final rule chooses one phrase-"matters of significance"-and makes that phrase part of the regulatory test for the administrative exemption, rather than merely interpretive guidance. As described below, final subsections 541.202(b) through (f) combine language from existing section 541.205, existing section 541.207, and current case law to more clearly define and delimit this concept.

Final subsection 541.202(b) begins with language from existing section 541.207(b) stating that the phrase 'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises." Final subsection 541.202(b) then contains the following non-exclusive list of factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance:

> [W]hether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices;

> whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

These factors were taken from the existing regulations, *see* 541.205(b), 541.205(c) and 541.207(d), or developed from facts which federal courts have found relevant when determining whether an employee exercises discretion and independent judgment. Federal courts generally find that employees who meet at least two or three of these factors are exercising discretion and independent judgment, although a case-by-case

analysis is required. *See, e.g., Bondy v. City of Dallas,* 2003 WL 22316855, at *1 (5th Cir. 2003) (making recommendations to management on policies and procedures); *McAllister v. Transamerica Occidental Life Insurance Co.*, 325 F.3d 997, 1000-02 (8th Cir. 2003) (independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *Cowart v. Ingalls Shipbuilding, Inc.*, 213 F.3d 261, 267 (5th Cir. 2000) (developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Piscione,* 171 F.3d at 535-43 (making recommendations to management on policies and procedures); *Haywood v. North American Van Lines, Inc.*, 121 F.3d 1066, 1071-73 (7th Cir. 1997) (negotiating on behalf of the employer with some degree of settlement authority; independent investigation and resolution of issues without prior approval; authority to waive or deviate from established policies and procedures without prior approval); *O'Neill-Marino v. Omni Hotels Management Corp.*, 2001 WL 210360, at *8-9 (S.D.N.Y. 2001) (negotiating on behalf of the employer with some degree of settlement authority; developing guidebooks, manuals, and other policies and procedures for employer or the employer's customers); *Strickerv. Eastern Off-Road Equipment, Inc.*, 935 F. Supp. 650, 656-59 (D. Md. 1996) (authority to commit employer in matters that have financial impact); *Reich v. Haemonetics Corp.*, 907 F. Supp. 512, 517-18 (D. Mass. 1995) (negotiating on behalf of the employer with some degree of settlement authority; authority to commit employer in matters that have financial impact); *Hippen v.*

First National Bank, 1992 WL 73554, at *6 (D. Kan. 1992) (authority to commit employer in matters that have financial impact). Other factors which federal courts have found relevant in assessing whether an employee exercises discretion and independent judgment include the employee's freedom from direct supervision, personnel responsibilities, trouble shooting or problem-solving activities on behalf of management, use of personalized communication techniques, authority to handle atypical or unusual situations, authority to set budgets, responsibility for assessing customer needs, primary contact to public or customers on behalf of the employer, the duty to anticipate competitive products or services and distinguish them from competitor's products or services, advertising or promotion work, and coordination of departments, requirements, or other activities for or on behalf of employer or employer's clients or customers. *See, e.g.*, *Hogan v. Allstate Insurance Co.*, 2004 WL 362378 (11th Cir. 2004); *Demos v. City of Indianapolis*, 302 F.3d 698 (7th Cir. 2002); *Lutz v. Ameritech Corp.*, 2000 WL 245485 (6th Cir. 2000); *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326 (5th Cir. 2001); *Heidtman v. County of El Paso*, 171 F.3d 1038 (5th Cir. 1999); *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527 (7th Cir. 1999); *Shockleyv. City of Newport News*, 997 F.2d 18 (4th Cir. 1993); *West v. Anne Arundel County, Maryland*, 137 F.3d 752 (4th Cir.), *cert. denied*, 525 U.S. 1048 (1998); *Reich v. John Alden Life Insurance Co.*, 126 F.3d1 (1st Cir. 1997); *Wilshin v. Allstate Insurance Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002); *Roberts v. National Autotech, Inc.*, 192 F. Supp. 2d 672 (N.D. Tex. 2002); *Orphanos*

v. Charles Industries, Ltd., 1996 WL 437380 (N.D. Ill. 1996).

Most of the remaining subsections in final 541.202 contain language from the existing regulations. Final subsection 541.202(c) contains language from existing section 541.207(a) and existing section 541.207(e) providing that "discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision." However, "employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level." Final subsection (c) also retains the credit manager and management consultant examples from existing section 541.207(e)(2). Final subsection 541.202(d) contains language from existing section 541.205(c)(6) providing that the "fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance." Final subsection 541.202(e) contains language from existing sections 541.207(c)(1) and 541.207(c)(2) stating that the exercise of discretion and independent judgment "must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." As in existing section 541.205(c), final subsection 541.202(e) provides that the exercise of discretion and independent judgment "does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work." Final subsection 541.202(f) includes language from

existing section 541.205(c)(2) that an employee "does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly."

In sum, as in the existing regulations, the final administrative exemption regulations establish a two-part inquiry for determining whether an employee performs exempt administrative duties. First, what type of work is performed by the employee? Is the employee's primary duty the performance of work directly related to management or general business operations? Second, what is the level or nature of the work performed? Does the employee's primary duty include the exercise of discretion and independent judgment with respect to matters of significance? *See, e.g., Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125-26 (9th Cir. 2002) (looking to both the type of work and the importance of the work). By retaining the "discretion and independent judgment" standard from the existing regulations, as clarified to reflect current case law, and combining the existing concepts of "substantial importance" and "matters of significance," the final rule provides clarity while at the same time maintaining continuity with the existing regulations.

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Section 541.203 Administrative Exemption Examples

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In cases such as *Reich v. John Alden Life Insurance Co.*, 126 F.3d 1 (1st Cir. 1997), *Hogan v.*

Allstate Insurance Co., 2004 WL 362378 (11th Cir. 2004), and *Wilshin v. Allstate Insurance Co.*, 212 F. Supp. 2d 1360 (M.D. Ga. 2002), federal courts have found employees who represent the employer with the public, negotiate on behalf of the company, and engage in sales promotion to be exempt administrative employees, even though the employees also engaged in some inside sales activities. In contrast, the court in *Casas v. Conseco Finance Corp.*, 2002 WL 507059, at *9 (D. Minn. 2002), held that the administrative exemption was not available for employees who had a "primary duty to sell [the company's] lending products on a day-to-day basis" directly to consumers and failed to exercise discretion and independent judgment.

The John Alden case involved the exempt status of marketing representatives working for a company that designed, created and sold insurance products, primarily for businesses that were purchasing group coverage for their employees. The marketing representatives did not sell through direct contacts with the ultimate customers, but instead relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of such independent sales agents to keep them apprised of the employer's financial products, to inform them of changes in prices, and to discuss how the products might fit their customers' needs. The marketing representatives also would inform the employer of anything they learned from the independent sales agents, such as information about a competitor's products or pricing. The First Circuit ruled that these activities were directly related to management

policies or general business operations and that the marketing representatives were exempt. Their activities involved "servicing" of the business because their work was "in the nature of 'representing the company' and 'promoting sales' of John Alden products, two examples of exempt administrative work provided by § 541.205(b) of the interpretations." 126 F.3d at 10. Thus, the court concluded that the marketing representatives' contact with the independent sales agents involved 'something more than routine selling efforts focused simply on particular sales transactions.' Rather, their agent contacts are 'aimed at promoting (*i.e.*, increasing, developing, facilitating, and/or maintaining) customer sales generally,' activity which is deemed administrative sales promotion work under section 541.205(b)." *Id.* (citations omitted, emphasis in original), quoting *Martin v. Cooper Electric Supply Co.*, 940 F.2d 896, 905 (3rd Cir. 1991), *cert. denied*, 503 U.S. 936 (1992).

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Subpart F, Outside Sales Employees

Section 541.500 General Rule for Outside Sales Employees

Section 13(a)(1) of the FLSA contains a separate exemption for any employee employed "in the capacity of outside salesman." Proposed section 541.500 set forth the general rule for exemption of

such "outside sales" employees.[11] Under proposed subsection 541.500(a), the outside sales exemption applied to any employee "with a primary duty of (i) making sales within the meaning of section 3(k) of the Act, or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." In addition, to qualify for exemption the outside sales employee must be "customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." Finally, proposed subsection 541.500(b) stated that in determining the primary duty of an outside sales employee, "work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work." Under this subsection, other work that furthers the employee's sales effort, including "writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences," is also considered exempt work.

The Department has retained this general rule as proposed.

The only modification intended in the proposed regulations was removing the restriction that exempt outside sales employees could not perform work unrelated to outside sales for more than 20-percent of the hours worked in a workweek by nonexempt

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[11] Although the statute refers to "salesman," the final rule, without objection from commenters, replaces this gender-specific term with "outside sales employees."

employees of the employer. This revision was proposed for consistency with the "primary duty" approach adopted for the other section 13(a)(1) exemptions. In addition, the current outside sales 20-percent restriction is particularly complicated and confusing since it relies on the work hours of nonexempt employees and requires tracking the time of employees who, by definition, spend much of their time away from the employer's place of business.

A large majority of the comments that address the outside sales exemption express support for the adoption of the "primary duty" test in lieu of the 20-percent rule. For example, the Society for Human Resource Management (SHRM) and Grocery Manufacturers of America (GMA) state that this revision would provide a more practical method for employers to determine whether an employee qualifies as an exempt outside sales employee. According to SHRM, in order to keep an account of the percentage of time that outside sales employees spend on exempt versus nonexempt tasks, as required under the 20-percent rule, employers essentially have to track the hours of their outside sales employees. SHRM notes that it is very difficult for employers to meet this responsibility given that outside sales employees spend large amounts of time away from their employers' regular places of business. GMA shares these concerns, stating that keeping track of an outside sales employee's individual activities to determine whether they are exempt, nonexempt or incidental to exempt sales activity is administratively difficult, if not impossible. The National Small Business Association comments that moving away from a percentage basis to the new definition of "primary duty" will alleviate

much of the administrative burden on small business owners.

Two law firms commenting on the outside sales exemption (Goldstein Demchak Baller Borgen & Dardarian and McInroy & Rigby) ask the Department to retain the current 20-percent limit on nonexempt work. Both firms express concern that the outside sales exemption would be subject to abuse by employers without a "bright-line" 20-percent test. In other words, employers might misclassify sales personnel as exempt under the outside sales exemption by merely requiring that they perform only minor amounts of outside sales work. A few commenters, such as the AFL-CIO, generally oppose removing the 20-percent limitation on nonexempt work for the same reasons discussed above in connection with the executive, administrative and professional exemptions.

After review of the relevant comments, the Department continues to believe that the application of the primary duty test to the outside sales exemption is preferable to the 20-percent tolerance test. As noted in several comments, the primary duty test is relatively simple, understandable and eliminates much of the confusion and uncertainty that are present under the existing rule. Cf. Ackerman v. Coca-Cola Enterprises, Inc., 179 F.3d 1260, 1267 (10th Cir. 1999) (citing existing § 541.505(a) to the effect that "'[a] determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole' and that "the time devoted to the various duties is an important, but not necessarily controlling, element' "), cert. denied, 528 U.S. 1145 (2000). It also avoids the necessity that employers

track the hours of its outside sales employees, which is consistent with the underlying rationale for exempting outside salespersons. Utilization of the primary duty concept also provides a consistent approach between the outside sales exemption and the exemptions for executive, administrative and professional employees. Finally, the Department is of the view that concerns relating to potential abuse under the new rule are addressed by the objective criteria and factors for determining an employee's primary duty that are contained in section 541.700.

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Section 541.503 Promotion Work

Under proposed section 541.503, "promotional work" is exempt outside sales work if it "is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations." However, "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." Proposed subsections 541.503(b) and 541.503(c) include examples to illustrate when promotional activities are exempt versus nonexempt work. To address commenter concerns discussed below, the Department has made minor changes to section 541.503(c).

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After reviewing the comments and current case law, the Department has made minor changes to section 541.503(c) to address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for

employees whose primary duty is making sales. As indicated in the proposal, the Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee "who does not in some sense make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test. *See* 1940 Stein Report at 46 (outside sales exemption does not extend to employees "engaged in paving the way for salesmen, assisting retailers, and establishing sales displays, and so forth").

Nonetheless, the Department agrees that technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales. Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale. *See* 1949 Weiss Report at 83 ("In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities

are not exempt"). *See also Ackerman v. Coca-Cola Enterprises, Inc.*, 179 F.3d 1260, 1266-67 (10th Cir. 1999) (substantial merchandising responsibilities, including restocking of store shelves and setting up product displays, did not defeat outside sales exemption for soft drink advance sales reps and account managers where such responsibilities were "incidental to and in conjunction with" sales they consummated at stores they visited), *cert. denied*, 528 U.S. 1145 (2000); *Wirtz v. Keystone Readers Service, Inc.*, 418 F.2d 249, 261 (5th Cir. 1969) ("student salesmen" not exempt where engaged in promotional activities incidental to sales thereafter made by others).

Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button. The changes to proposed section 541.503(c) are intended to avoid such a result. Finally, the Department notes that outside sales employees may also qualify as exempt executive, administrative or professional employees if they meet the requirements for those exemptions. For example, an employee whose primary duty is promotion work such as advertising or marketing-not selling-may not meet the requirements for the "outside sales" exemption, but could be an exempt administrative employee.

No. 09-0437

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE NOVARTIS
WAGE AND HOUR LITIGATION

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

CAROL A. DE DEO
Deputy Solicitor
for National Operations

WILLIAM C. LESSER
Deputy Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate
Litigation

JENNIFER R. MARION
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Suite N-2716
Washington, D.C. 20210
(202) 693-5555

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No. 09-0437

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of the Plaintiffs-Appellants. The district court committed legal error when it concluded that the Plaintiffs-Appellants, Pharmaceutical Sales Representatives ("Reps") employed by Novartis Pharmaceutical Corporation ("NPC"), are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act") under the "outside sales" exemption or, alternatively, the "administrative" exemption. *See* 29 U.S.C. 213(a)(1).

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary administers and enforces the FLSA, *see* 29 U.S.C. 204(a) and (b), 211(a), 216(c),

217, and has a compelling interest in ensuring that it is interpreted correctly. By concluding that the Reps are exempt as outside salespersons despite the fact that they do not engage in any sales, the district court failed to follow the Department of Labor's ("Department's") regulatory provisions limiting the exemption to employees who make sales or obtain orders or contracts for services for which a consideration will be paid by the client or customer. *See* 29 C.F.R. 541.500. Moreover, the court's conclusion that the Reps, who are given lists of physicians to visit and are not allowed to go beyond the messages crafted by NPC (as set out in scripts and related materials with which they are provided), are exempt administrative employees is inconsistent with the regulatory requirement that employees must exercise discretion and independent judgment with respect to matters of significance in order to qualify for the administrative exemption. *See* 29 C.F.R. 541.200(a)(3).

STATEMENT OF THE ISSUES

(1) Whether the district court erred by concluding that the Reps are exempt outside salespersons despite the fact that they do not "make sales" as required by the Department's "outside sales" regulations.

(2) Whether the district court erred by concluding that the Reps are exempt administrative employees in accordance with the Department's "administrative exemption" regulations, which limit the exemption to employees who exercise discretion and independent judgment with respect to matters of significance.

STATEMENT OF FACTS

The plaintiffs in this case are a class of over 2,500 Reps who worked for NPC in New York, California, and other states. The Food and Drug Administration ("FDA") prohibits Reps from selling drugs to physicians, *see In Re Novartis,* 593 F. Supp. 2d 637, 642 (S.D. N.Y. 2009); their primary duty is to call on physicians and provide them with information about NPC's drugs. *Id.* at 641. The goal of providing the physicians with this information is to convince them to prescribe NPC's drugs to their patients. Id.[7]

NPC trains the Reps in sales techniques as well as giving them basic training in pharmacology and other relevant subjects. *Id.* NPC expects the Reps to deliver a "core message" about the drugs to each physician, and provides them with scripts and other materials to help them do so. *Id.* They may not elaborate on the messages crafted by NPC, such as making claims about a drug's effectiveness, absent NPC authorization. *Id.* NPC also provides the Reps with materials to use in their presentations, such as pamphlets, clinical studies, and visuals aids, together with instructions on how these materials should be utilized; Reps may not use other materials unless NPC has cleared them. *Id.*[8] Within these

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[7] The patient does not purchase the prescribed drugs from a physician, but rather from a pharmacy. NPC sells its drugs directly to distributors, who in turn sell them to pharmacies, who then sell them to patients with prescriptions (Oral Argument Transcript, Nov. 18, 2008 at 5:9-10).

[8] If a Rep does not have a scripted response from NPC to a physician's concerns, she must try to "sidestep" the question by

stringent parameters, the Reps "tailor" their presentations to each physician based on such considerations as the amount of time the physician is willing to meet with the Rep, the physician's patient base and prescribing habits, and the physician's personality. *Id.* at 642. NPC also provides the Reps with a budget for organizing informational events for their target physicians, following NPC guidelines for speakers and invitees. *Id.*

Each Rep is assigned a target list of physicians to call on; Reps may not remove or add physicians to their list without NPC's consent, and are reprimanded for failing to adhere to their target lists (Plaintiffs-Appellants' Statement of Facts ("SOF") at ¶¶ 37-40). NPC also assigns the Reps specific drugs to promote. *In Re Novartis,* 593 F. Supp. 2d at 641. Although NPC does not directly supervise the Reps, it expects them to call on a certain number of physicians on their list between 8 a.m. and 5 p.m. each weekday, determines how often Reps should call on each physician, and ranks each physician and drug in order of importance for each Rep (Plaintiffs-Appellants SOF at ¶ 37). *Id.* at 642. NPC also expects the Reps to "close" each physician visit by requesting a non-binding commitment to prescribe NPC drugs to their patients when appropriate or, in other cases, giving a physician a clinical study to review or thanking the physician for his time. *Id.* The Reps earn an average annual "salary" of $91,500 that includes both base pay and "incentive

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restating the "core message" or refer the physician to medical experts and NPC (Plaintiffs-Appellants SOF at ¶¶ 77-78).

payments" based on the number of prescriptions written by physicians. *Id.*

SUMMARY OF ARGUMENT

Under the Department's regulations, the Reps do not meet the requirements for either the outside sales or administrative exemption. The Reps do not sell or take orders for NPC's drugs; rather, they provide information to target physicians about NPC's drugs with the goal of persuading the physicians to prescribe those drugs to their patients. The actual sale of drugs takes place between NPC and pharmacies. Although the Reps' duties bear some of the indicia of sales -- they use methods of persuasion similar to those of salespersons, they receive some of their compensation. in the form of bonus or incentive payments, and their promotion work affects NPC's actual drug sales -- the fact that the Reps do not actually "make sales" conclusively demonstrates that the position is not that of an outside salesperson consistent with the Department's legislative rules.

Furthermore, when promoting the drugs to the physicians, the Reps are not permitted to deviate from the "core message" found in the scripts, manuals, brochures, and other materials NPC provides them. If the Reps do not have a scripted response to a physician's question, they are required to either reiterate the "core message" or refer the physician to NPC's medical experts. These constraints on the Reps' primary duties demonstrate that, although the Reps have some discretion (such as deciding what time of day to see which physician, tailoring their message to a physician's personality

or time constraints, and deciding whether to ask for a non-binding commitment at the end of a visit), they do not exercise discretion and independent judgment with respect to matters of significance. Thus, the Reps do not qualify for the administrative exemption.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT OUTSIDE SALESPERSONS DESPITE THE FACT THAT THEY DO NOT "MAKE SALES" AS REQUIRED BY THE DEPARTMENT'S "OUTSIDE SALES" REGULATIONS

Section 13(a)(1) of the FLSA provides a complete exemption from the overtime pay requirement for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman[,] as such terms are defined and delimited from time to time by regulations of the Secretary[.]" 29 U.S.C. 213(a)(1). The Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see Bilyou v. Dutchess Beer Distribs., Inc.*, 300 F.3d 217, 222 (2d Cir. 2002).

Pursuant to Congress's express delegation of rulemaking authority, the Secretary issued revised regulations after notice and comment that "define and delimit" the FLSA's overtime exemptions. *See* 69

Fed. Reg. 22,122 (Apr. 23, 2004). As such, they are entitled to controlling deference. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984); *see also Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165-68, 171-74 (2007); *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005); *United States v. Mead* Corp., 533 U.S. 218, 229-30 (2001).[9]

1. As noted *supra*, section 13(a)(1) of the FLSA provides an exemption from the statute's minimum wage and overtime requirements for "any employee employed . . . in the capacity of outside salesman." The Department's regulations define that phrase as including "any employee . . . whose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer."

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[9] To the extent that the plain language of the Department's outside sales or administrative regulations are ambiguous, courts must give controlling deference to the Department's interpretation of its own regulations unless such interpretation is plainly erroneous or inconsistent with those regulations. *See Federal Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1155 (2008); Auer v. *Robbins*, 519 U.S. 452, 461 (1997). This principle holds true whether the Secretary's interpretation is found in a Preamble to a final rule published in the Federal Register, an opinion letter or other interpretive materials, or in a legal brief. *See, e.g., Coke*, 551 U.S. at 171 (controlling deference to Department's Advisory Memorandum issued during the course of litigation); *Auer*, 519 U.S. at 462 (controlling deference to legal brief).

29 C.F.R. 541.500(a)(1)(i)-(ii).[10] "Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 C.F.R. 541.700, and section 3(k) of the FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k); *see* 29 C.F.R. 541.501.[11] The Department's regulations further explain that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property," and that "services" "extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. 541.501(b) and (d).

The regulations also explain the relationship between promotional work and the outside sales exemption, clarifying that

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[10] It is clear that the Reps are "customarily and regularly engaged away from" NPC's place of business. 29 C.F.R. 541.500(a)(2).

[11] Contrary to the conclusions of two recent district court decisions, the Reps' activities do not come within the "other disposition" language found in section 3(k). *See Schaefer-LaRose v. Eli Lilly & Co.*, S.D. Ind. No. 07-1133 (Sept. 29, 2009); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009). The term "other disposition" must be read in the context of the language that precedes it, i.e., in the context of making some kind of a sale. The most the Reps can obtain is a non-binding commitment from a physician to prescribe NPC drugs as appropriate.

> [p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. 541.503(a). In other words, "[p]romotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." 29 C.F.R. at 541.503(b).

Thus, under the plain language of the Department's regulations, the Reps do not meet the primary duties test for the outside sales exemption.[12] Because the Reps do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe NPC's drugs to their patients when appropriate, the

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[12] "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations." 29 C.F.R. 541.2. Therefore, contrary to the district court's suggestion in *In Re Novartis*, 593 F. Supp. 2d at 654 n.7., the fact that NPC "hired, trained, paid, and incentivized [the Reps] as sales personnel" is not in any way dispositive.

Reps do not meet the regulation's plain and unmistakable requirement that their primary duty must be "making sales." 29 C.F.R. 541.500(a)(1)(i). Contrary to the district court's assertion that "Reps make sales in the sense that sales are made" in the pharmaceutical industry, *In Re Novartis*, 593 F. Supp. 2d at 650, the actual sale of NPC's drugs occurs between the company and distributors (and then to the pharmacy).[13] Insofar as the Reps' work increases NPC's sales, it is non-exempt promotional work "designed to stimulate sales that will be made by someone else." 29 C.F.R. 541.503(b).

2. To the extent, however, that there is any ambiguity on this point in the Department's regulations, the Department's Wage and Hour Division has consistently reiterated its position that a "sale" for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.[14] For example, Wage and Hour

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[13] Even if it is true that absent a prescription no drugs would be sold to patients, *see In Re Novartis*, 593 F. Supp. 2d at 650, it nonetheless is "irrelevant to the dispositive inquiry of whether [Reps] make sales of those products as defined in the FLSA.". *Kuzinski, et al. v. Schering Corp.*, 604 F. Supp. 2d 385, 398 (D. Conn. 2009) (internal quotation marks omitted).

[14] In the context of addressing the "retail or service establishment" criteria of the FLSA's section 7(i) exemption, *see* 29 U.S.C. 207(i), Wage and Hour noted when discussing the definition of "sale" in section 3(k) of the FLSA that "[t]hough the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or

rejected the application of the outside sales exemption to individuals soliciting charitable contributions, noting that "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption. . . . [These] solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid." WH Opinion Letter FLSA 2006-16, 2006 WL 1698305; see WH Opinion Letter August 19, 1994, 1994 WL 1004855 (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations). Further, Wage and Hour's Field Operations Handbook ("FOH") states that "[an employee whose duty is to convince a dealer of the value of his employer's service to the dealer's customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k)." FOH § 22e04 (1965).

3. This Court has not addressed the question whether Reps are exempt as outside salespersons.[15]

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sold." WH Opinion Letter FLSA 2005-06, 2005 WL 330605 (citing *Wirtz v. Charleston Coca-Cola Bottling Company, Inc.*, 237 F. Supp. 857 (E.D.S.C. 1965)) (internal quotation marks omitted).

[15] No circuit court has addressed this specific question. There are, however, cases involving the application of the outside sales and administrative exemptions pending in the Third and Ninth Circuits. In *Smith* v. *Johnson & Johnson*, No. 09-1223, now before the Third Circuit on appeal, the district court

Within the Second Circuit, the district courts that have addressed the question have, with the exception of the decision in the instant case, concluded that the outside sales exemption does not apply to Reps because they do not make sales as required by the Department's regulations. *See Kuzinski*, 604 F. Supp. 2d at 403 ("Because [the Reps] undisputedly do not sell or make any sales as those terms are defined in the FLSA and its implementing regulations, they fall outside the FLSA's outside sales exemption.") (internal quotation marks omitted); *Ruggeri v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 585 F. Supp. 2d 254, 272 (D. Conn. 2008) ("Because [the pharmaceutical company] has not shown that [the Reps] make sales or obtain contracts or orders, the outside sales exemption is inapplicable."); *Amendola v. Bristol- Myers Squibb Co.*, 558 F. Supp. 2d 459, 470 (S.D.N.Y. 2008) ("As a starting point, the interpretation of the [FLSA outside sales] exemption

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determined that the outside sales exemption does not apply to Reps because they do not "make sales," but that they are exempt administrative employees who exercise discretion as to matters of significance. *See Smith v. Johnson & Johnson*, 2008 WL 5427802, at *11-12 (D. N.J. Dec. 30, 2008). Currently before the Ninth Circuit are two cases in which the Central District of California concluded that Reps are exempt as outside salespersons. *See Yacoubian v. Ortho-McNeil Pharmaceutical Corp.*, Ninth Cir. No. 09-55225 (No. 07-127, C.D. Cal. Feb. 6, 2009); *Delgado v. Ortho-McNeil Primary Care, Inc.*, Ninth Cir. No. 09-55229 (No. 07-263, C.D. Cal. Feb. 6, 2009); *cf. D'Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir. 2009) (certifying to California Supreme Court the question whether the Central District of California correctly concluded that Reps are exempt outside salespersons under California state law; the district court's decisions relied in part on its interpretation of the FLSA's requirements).

rests on the plain meaning of the statutory and regulatory texts that define it.").

The district court here relied upon this Court's statement in an FLSA "salary basis" case that "[g]iven the broad scope of the FLSA and its implementing regulations, [the Department's] regulations provide only general guidance to accommodate the varying needs of employers and employees in a diverse and varied national economy," *see Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 163 (2d Cir. 2008), for its conclusion that it could "take[] into account the characteristics of the industry in question when determining the applicability of the outside sales exemption." *In Re Novartis*, 583 F. Supp. 2d at 649. As noted by the district court in *Kuzinski*, however, "that observation . . . does not mean that an exemption to an employer's obligation to pay overtime under the FLSA can apply more broadly than the regulations specify." 604 F. Supp. 2d at 397 (internal quotation marks omitted).[16] "The conclusion that [Reps] fall within the outside sales exemption from FLSA's overtime provisions on the basis of the characteristics of the industry in question . . . notwithstanding [the Reps'] lack of capacity to sell, and physicians' lack of capacity to purchase" is an

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[16] This Court, despite referring to the "general guidance" provided by the regulations, did not ignore what the regulations plainly and specifically prescribe. *See Havey*, 547 F.3d at 163-64 ("[T]he regulations specify that a salaried employee must be paid a fixed and predetermined amount . . . but do not prescribe when or how frequently this fixed element of compensation may be determined . . . .").

attempt at "back-fitting . . . the FLSA to industry practices." *Id.* at 399 (internal quotation marks omitted); *see Ruggeri*, 585 F. Supp. 2d at 267 ("The justification for the pharmaceutical industry's use of [Reps] and direction of their efforts at physicians based on the artifact of medical and drug regulation . . . does not provide justification for applying the outside sales exemption to [the Reps], especially given that FLSA exemptions apply only to those employees who are plainly and unmistakably within them.") (internal quotation marks omitted).

As noted by the Tenth Circuit, "[t]he touchstone for making a sale, under the [Department's regulations], is obtaining a commitment." *Clements v. Serco*, 530 F.3d 1224, 1227 (2008) (concluding that civilian military recruiters are not within the outside salesperson exemption even though they "engaged in sales training and 'sold' the idea of joining the Army to potential recruits," because they did not engage in sales work as defined by the Department's regulations). In a similar situation to that presented here, the district court in *Kuzinski* concluded:

> [T]he closest that [Reps] come to consummating "sales" is increasing the overall demand for its products, such that [other company] employees negotiate and commit to contracts with wholesalers -- not the physicians to whom [the company's] products are promoted. An employee does not consummate a "sale" for purposes of the FLSA merely by "lay[ing] the groundwork" for another employee to obtain a customer's commitment. ... . To the extent [the Reps] lay foundation or groundwork, it is to increase or

> maintain their employer's market share for the products they promote. In this sense they pave the way for sales but in no more direct a manner as a pharmaceutical company's direct-to-consumer advertising, which raises demand for that company's products. Neither of these activities constitutes "sales" under the FLSA.

604 F. Supp. 2d at 399 (citing *Clements*, 530 F.3d at 1229).

4. The cases cited by the district court as support for its conclusion that the Reps "make sales" are inapposite. In *Gregory v. First Title of America, Inc.*, 555 F.3d 1300, 1308-10 (2009), the Eleventh Circuit concluded that a "Marketing. Director" was an exempt outside salesperson because she obtained orders for title insurance services. In contrast to the instant case, there was no "evidence of any other intervening sales effort between [the Marketing Director] and orders placed with [her employer]"; once she obtained the order for title insurance services, the sale was complete. *Id.* at 1309. The First Circuit case cited by the district court, *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 47 (2008), *cert. denied*, 129 S.Ct. 2864 (2009), involved the question whether Reps (which that court referred to as "detailers") were entitled to access to "patient-identifiable and prescriber-identifiable data" about prescriptions written in New Hampshire. Although the First Circuit referred to the Reps effect in increasing the pharmaceutical companies' market share, the question of pharmaceutical sales, in relation to the FLSA or any other law, was not before it. Similarly, although the district court in *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085 (D.

Minn. 1981), *aff'd,* 684 F.2d 565 (8th Cir. 1982), described the employees of cardiac pacemaker manufacturers who promoted the pacemakers to physicians as "sales representatives" and their work in terms of "sales," the issue implicated in that case was a covenant not to compete, not the FLSA's outside sales exemption. *Id.* at 109495. The court was interpreting the term "customer" under applicable contract construction (*i.e.*, the customers with whom Gibbons had contact in the year immediately preceding his employment with the employer), not the term "sale" under the FLSA or, more specifically, what is required before an employer may avail itself of the outside sales exemption.

II. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT ADMINISTRATIVE EMPLOYEES IN ACCORDANCE WITH THE DEPARTMENT'S "ADMINISTRATIVE EXEMPTION" REGULATIONS, WHICH LIMIT THE EXEMPTION TO EMPLOYEES WHO EXERCISE DISCRETION AND INDEPENDENT JUDGMENT WITH RESPECT TO MATTERS OF SIGNIFICANCE

1. The employer failed to show that the Reps exercise discretion and independent judgment with respect to matters of significance. Under the Department's administrative exemption regulations, an "employee employed in a bona fide administrative, capacity" means "any employee . . . whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the

employer or the employer's customers . . . [and] . . . [w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. 541.200(a)(2)-(3).[17] The requirement that the employee's primary duty include the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. 541.202(a). Furthermore, the phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation, with the following factors to be considered:

> whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the

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[17] In order to fall within the administrative exemption, the employee must also meet the salary requirement of $455 per week. *See* 29 C.F.R. 541.200(a)(1). The salary requirement is not at issue in this case. Further, because the Reps do not satisfy the "discretion and independent judgment with respect to matters of significance" prong of the administrative exemption, this brief does not address whether the Reps' "primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. 541.200(a)(2) and (3).

> business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

29 C.F.R. 541.202(b).[18] Although this list is not exhaustive, it indicates the kind of activities that constitute "matters of significance."

Moreover, the exercise of discretion and independent judgment must be more than the use of skill in applying well- established techniques,

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[18] As the Preamble to the final rule, 69 Fed. Reg. 22,143 (Apr. 23, 2004), explained, federal courts generally find that employees who meet at least two or three of the indicators mentioned in 29 C.F.R. 541.202(b) are deemed to be exercising discretion and independent judgment with respect to matters of significance, although a case-by-case analysis is required.

procedures, or specific standards described in manuals or other sources. *See* 29 C.F.R. 541.202(e); *see also* 541.203(g)-(i) (clarifying through examples of exempt and non-exempt administrative employees that reliance on techniques and skills developed through specialized training and use of manuals is insufficient for application of the exemption). The regulations also clarify that "[a]n employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses, if the employee fails to perform the job properly." 29 C.F.R. 541.202(f).

2. Wage and Hour has consistently reiterated that both the nature and level of the employee's decisions as they relate to the employer's business operations determine whether the employee exercises discretion and independent judgment with respect to matters of significance. "In this regard, it is not sufficient that an employee makes decisions regarding when and where to do different tasks, as well as the manner in which to perform them." WH Opinion Letter FLSA 2006-45, 2006 WL 3930478 (copy editors do not exercise discretion as to matters of significance even though they "organize work priorities to meet production deadlines set by management [and] make decisions on workflow within their areas and communicate these decisions to club copywriters") (citing *Clark v. J.M. Benson Co.*, 789 F.2d 282, 287 (4th Cir. 1986)) (internal quotation marks omitted). Another Wage and Hour opinion letter from 2006, denying the application of the administrative exemption to legal analysts, provides a helpful analogous example:

> Although you state that you work independently and use your own judgment as to how to prioritize your work assignments, including how the projects will be executed and how much time to spend on each assignment, it is not sufficient that an employee makes decisions regarding relatively insignificant matters . . . Nor is it sufficient that an employee makes limited decisions, within clearly "prescribed parameters." *See Dalheim v. KDFW-TV,* 706 F. Supp. 493, 509 (N.D. Tex. 1998), *aff'd,* 918 F.2d 1220 (5th Cir. 1990). Rather, there must be the exercise of discretion and independent judgment on matters of significance or consequence related to the management or general business operations of the employer or the employer's customers. For instance . . . you do not formulate or implement management policies, utilize authority to waive or deviate from established policies, provide expert advice, or plan business objectives in accordance with the dictates of § 541.202(b).

WH Opinion Letter FLSA 2006-27, 2006 WL 2792441.[19]

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[19] Wage and Hours' opinion letter on legal analysts also demonstrates that regulatory or legal limitations on an employee's exercise of discretion are, in fact, limitations that may preclude application of the administrative exemption: "In addition, most jurisdictions have strict prohibitions against the unauthorized practice of, law by laypersons. . . . The implication of such strictures is that paralegal employees would not have the amount of authority to exercise independent judgments with regard to legal matters necessary to bring them within the

Much like the legal analysts, Reps work independently (i.e., without direct supervision), determine what time of day to visit the physicians on their lists, and decide how best to execute their presentations within clearly prescribed parameters. This, however, similarly does not suffice to qualify for the administrative exemption; the Reps do not perform any primary duties that are largely comparable to those found in 29 C.F.R. 541.202(b), such as formulating or implementing management policies, utilizing authority to deviate from established policies, providing expert advice, or planning business objectives.[20] *Compare* WH Opinion

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administrative exemption." WH Opinion Letter FLSA 2006-27. Similarly, there are legal constraints placed on the Reps. "Since the Reps are advocating products which are routinely and closely regulated by the Food and Drug Administration (FDA), NPC prepares scripts and related materials which the Reps are expected to use to deliver a 'core message' about NPC products to each physician they visit; Reps may not go beyond the boundaries of the messages crafted by NPC." *In Re Novartis* 593 F. Supp. 2d at 641.

[20] The cases set out in the Preamble to the 2004 Part 541 regulations to support the factors listed in 29 CF.R. 541.202(b) clearly refer to the kind of work not engaged in by the Reps here -- making recommendations to management on policies and procedures; conducting independent investigation and resolution of issues without prior approval; having authority to waive or deviate from established policies and procedures without prior approval; developing guidebooks, manuals, and other policies and procedures for the employer or the employer's customers; negotiating on behalf of the employer with some degree of settlement authority; having authority to commit

Letter FLSA 2006-34, 2006 WL 3227789 (applying administrative exemption to community events supervisors because their authority to negotiate and bind their employers on significant matters such as negotiating contracts with vendors was sufficient to demonstrate discretion and independent judgment with respect to matters of significance); WH Opinion Letter FLSA 2006-46, 2006 WL 3930479 (location managers' primary duties, such as creating and enforcing regulations for the production crew, committing the employer in financial matters, and negotiating site rentals, included the exercise of discretion and independent judgment as to matters of significance).

3. No circuit court has addressed whether Reps are exempt administrative employees. Besides the instant case, one district court within the Second Circuit, relied upon by the district court in *In Re Novartis,* 593 F. Supp. 2d at 656-58, has concluded that the "discretion and independent judgment with respect to matters of significance" test for the administrative exemption "likely" applies to Reps because their daily decisions (which are similar to those in this case) "seek to influence prescription writing practices -- a matter of great consequence to [their employer's] business" -- and their "exercises of judgment [are] ways to drive the business [and] move market share," and because "if the doctor didn't like [the Rep], then the doctor was not going to prescribe the drug." *Amendola,* 558 F. Supp. 2d at 477. At

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employer in matters that have financial impact. *See* 69 Fed. Reg. 22,143-144 (April 23, 2004).

issue in *Amendola,* however, was the plaintiff Rep's motion for discovery of the names and addresses of the pharmaceutical company's Reps, authorization for notice of the collective action to be sent to those potential plaintiffs, and equitable tolling of any claims they may file. *See* 558 F. Supp. 2d at 462. As such, the district court looked only at the "likelihood" that the pharmaceutical company would successfully argue the application of the administrative exemption to the Reps when deciding whether to grant the plaintiff's motion. *Id.* at 477.

Furthermore, the district court in *Amendola* relied in part on a 1945 Wage and Hour opinion letter which concluded that drug companies' "medical detailists" were administratively exempt. Those medical detailists, though, "were consulted with respect to individual nutritional problems encountered by hospitals and physicians, such as determining whether the use of subject's product was related to the occurrence of an epidemic," and "work[ed] virtually without supervision." *Ruggeri,* 585 F. Supp. 2d at 276 (internal quotation marks omitted). In addition, the court's analysis appears to have misunderstood the "matters of significance" requirement. In commenting on "driving the business" and "market share," it blurred the distinction between an employee who exercises discretion and independent judgment related to matters of significance and one whose skillful job performance necessarily has some impact on her employer's bottom line (something undoubtedly

important to the company).[21] *See, e.g., Robinson-Smith v. Government Employees Insurance Co.*, 323 F. Supp. 2d 12, 25 (D. D.C. 2004) (noting, in the course of concluding that auto damage adjusters, who assess, negotiate, and settle automobile damage claims, travel to and from inspection sites, inspect vehicles for damage, and write estimates for repairs were not exempt, that "'the use of skill is to be clearly distinguished from work requiring discretion

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[21] In addition to the decision in *Amendola*, the district court in the instant case relied heavily on another district court case, *Cote* v. *Burroughs Wellcome Co.*, 558 F. Supp. 883 (E.D. Pa. 1982), as persuasive authority for concluding that the Reps are exempt administrative employees. In *Cote*, the court concluded that a Rep exercised sufficient discretion for the administrative exemption to apply because, even though she worked within a tightly-controlled marketing environment, the Rep could tailor her presentation to individual doctors in terms of her manner and the frequency of her visits and could "cultivat[e] a good working relationship with the nurses at a particular clinic and asking for their help in reminding physicians about the drug." 558 F. Supp. at 887. As a threshold matter, contrary to the district court's reasoning in *Ruggeri*, 585 F. Supp. 2d at 276, the fact that *Cote* was decided under the "old" Part 541 regulations does not vitiate its reasoning. *See* 69 Fed. Reg. 22,143 (April 23, 2004) (making the phrase "matters of significance" part of the regulatory test for the administrative exemption instead of having it as part of the Department's interpretive guidance). Nevertheless, the analysis in *Cote* fails for all the reasons set out *supra*. "Tailoring" one's strictly circumscribed presentations and establishing good personal working relationships do not equate to primarily performing duties requiring the exercise of discretion and independent judgment concerning matters of significance. Of course, as district court decisions, neither *Amendola* nor *Cote* is controlling vis-à-vis this Court. *See Lombard v. Whitman*, 485 F.3d 73, 83 (2d Cir. 2007) (distinguishing between own precedent and district court decisions).

and independent judgment'") (quoting *Reich v. American Int'l Adjustment Co.*, 902 F. Supp. 321, 324 (D. Conn. 1994)). As noted by the Department's regulations, an employee does not exercise discretion and independent judgment related to matters of significance merely because his success (or lack thereof) in performing his duties has a financial impact on his employer's business. *See* 29 C.F.R. 541.202(f); *see also Ruggeri*, 585 F. Supp. 2d at 276 n.13 (when denying summary judgment to pharmaceutical company on the question of whether its Reps were exempt administrative employees, the court rejected the argument that the exemption applied because of Reps' impact on company's financial success). Indeed, if the "matters of significance" standard were interpreted to include any actions that in some manner "move market share" or "drive the business," it would potentially broaden the exemption to include the host of employees whose successful performance of their duties contributes in some way to the success of the company; such an interpretation would effectively swallow the "rule" requiring the payment of the minimum wage and overtime compensation under the FLSA.[22]

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[22] It is worth noting that the district court in *In Re Novartis* did not rely upon the First Circuit's decision in *Reich v. John Alden Life Insurance Company*, 126 F.3d 1, 9 (1st Cir. 1997), to show that the Reps exercised discretion and independent judgment concerning matters of significance; rather, it used *Alden* to show that the Reps performed office or non-manual work directly related to management or general business operations. *See* 593 F. Supp. 2d at 655-58. In any event, the decision in *Alden* can be distinguished on its facts. In *Alden*, marketing

4. In sum, as with the outside sales exemption, the district court's administrative exemption ruling in this case is unpersuasive in its attempt to "back-fit" the FLSA regulations into the pharmaceutical industry's practices. The facts are clear that, within the stringent restrictions on Reps' work activities, the Reps' discretion is limited to such matters as what time of day to visit a particular doctor, the manner in which to approach the doctor based on the doctor's personality, and how best to deliver (i.e., to "fit in") the NPC's "core message" for a particular drug given the time constraints of a visit. To the extent that the Department's administrative exemption regulations instruct that "[t]he phrase

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representatives working for a company that designed, created, and sold insurance products (primarily for businesses that were purchasing group coverage for their employees) did not sell through direct contacts with the ultimate consumers but, rather, relied upon licensed independent insurance agents to make sales of the employer's financial products. The marketing representatives were responsible for maintaining contact with hundreds of these independent sales agents to keep them apprised of the employer's financial products, inform them of changes in prices, and discuss how the product might fit their customer's needs (they would also inform the employer of what they learned from these agents, e.g., regarding a competitor's products or pricing). The First Circuit concluded that these marketing representatives were administratively exempt. Significantly, however, the First Circuit, in concluding that the discretion and independent judgment prong was met, noted that the marketing representatives "do not use prepared scripts or read from a required verbatim statement, nor do they operate within the contours of a prescribed technique or 'sales pitch.'" *John Alden Life Ins. Co.*, 126 F.3d at 14. By contrast, the Reps in the instant case are provided with scripts, which they are required to use, to help them deliver the requisite "core message." *In Re Novartis*, 593 F. Supp. 2d at 641.

'discretion and independent judgment' must be applied in the light of all the facts involved in the particular employment situation in which the question arises," *see* 29 C.F.R. 541.202(b), this guidance does not extend to ignoring the clear parameters and requirements of the regulations. *See, e.g., Kuzinski,* 604 F. Supp. 2d at 397-99. The Seventh Circuit's decision in *Kennedy v. Commonwealth Edison Co.*, 410 F.3d 365, 374-75 (2005), although analyzing the pre-2004 regulations, provides a useful comparison of what constitutes the exercise of discretion related to matters of significance within a highly regulated industry. In *Kennedy,* the Seventh Circuit concluded that, despite the heavily regulated nature of the nuclear power industry, work planners whose "job is to come up with a set of instructions that will remedy reported problems around the plant" were exempt. Even though the planners "look to past work packages for guidance and use a computer to aid their recommendations . . . [when] [f]aced with novel or not-so-novel problems, judges and Work Planners must use their independent judgment to determine how best to respond." *Id.* The work planners, although heavily regulated, thus had the discretion to develop new ways to resolve issues. The NPC Reps, on the other hand, do not have such discretion; NPC provides them with specific instructions for each aspect of their job, including scripted responses for physician concerns, from which NPC does not permit them to deviate. They therefore should not be deemed to exercise discretion and independent judgment regarding matters of significance.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

Respectfully submitted,

CAROL A. DE DEO
Deputy Solicitor for National Operations

WILLIAM C. LESSER
Deputy Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

/s/
JENNIFER R. MARION
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
Suite N-2716
Washington, D.C. 20210
(202) 693-5555